Term No. 14. Agenda No. 25

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

March Term, A. D., 1921.

JOSEPH F. DEROUSSE,
Appellee,
vs.
CHARLES R. BARTELS,
Appellant.

Appeal from
RANDOLPH

Reversed
4-5-22.

223 I.A. 629

Opinion by Higbee, P. J.

Appellee's declaration as amended consisted of one special count, alleging in substance that the plaintiff is the lessee of the east one half of lot nineteen of survey three of Kaskaskia Commons, Randolph county, Illinois, and that the lease under which he holds is in words and figures as follows, towit: "This indenture made this 21st day of October, A. D., 1889 by and between 'The President and Trustees of the Commons of Kaskaskia', of the county of Randolph, in the State of Illinois, on the one part and Samuel Ragsdale and Harriet Gendron of the county of Randolph in the State of Illinois, on the other part; Witnesseth: That the said 'President and Trustees of the Commons of Kaskaskia', for the consideration hereinafter mentioned, hath demised, granted and to farm let, and doth hereby demise, grant and to farm let unto the said Samuel Ragsdale and Harriet Gendron, his executors, administrators and assigns, lot number nineteen, survey three, containing 39 10-100 acres, situated, lying and being in the Commons of Kaskaskia, as surveyed, platted and recorded in the recorder's office of the county of Randolph, in the State of Illinois, according to an Act of the General Assembly of the State of Illinois, approved Janury 3rd, 1851. To have and to hold the said premises, with the appurtenances thereunto belonging for and during the term of fifty years from the 16th day of February, A. D., 1889, fully to be completed and ended.

And the said Samuel Ragsdale and Harriet Gendron, for themselves, their heirs, executors and administrators, does further covenant and agree to pay, or cause to be paid, to the President and Trustees aforesaid, or to any person by them authorized to receive the same, the sum of one dollar and five cents per annum for each and every acre contained in the premises aforesaid; the first payment to be due and payable on the first day of December, A. D. 1889, and annually on said day thereafter, during the continuance of said lease; and the said Samuel Ragsdale and Harriet Gendron further agrees to pay, or cause to be paid, all assessments for taxes for all purposes that may be assessed against said premises, according to law, during the continuance of said lease. And it is

further agreed, by the 'President and Trustees' aforesaid, that the said Samuel Ragsdale and Harriet Gendron shall be entitled to use timber on any of the Commons of Kaskaskia, (not leased), for the purpose of fire wood, building on, or fencing the premises aforesaid, as other citizens off Kaskaskia.

And it is further agreed by and between the said parties, that any failure to pay, or cause to be paid, the rent and taxes aforesaid, on the part of said Samuel Ragsdale and Harriet Gendron, shall be considered a forfeiture of the aforesaid premises."

That said described tract of land was subsequently sold by the Land Commissioners for the Commons of Kaskaskia, as provided by an Act of the General Assembly of Illinois, known as "An Act to provide for the sale off the Kaskaskia Commons, upon the Island of Kaskaskia, in the county of Randolph, and to create a permanent school fund for the inhabitants of said Island out of the proceeds of said sale, and to punish any person failing to comply with the provisions thereof", which said Act became a law on the 16th day of June, A. D. 1909; that by mesne conveyances the defendant, Charles R. Bartels and one Emery Andrews became the owners of the fee simple title to the said tract of land, and thereby became the landlords of the plaintiff, that the plaintiff pays the annual rental as provided in the above lease to the defendant and one Emery Andrews, his landlords, as aforesaid; that the said tract of land is within the Kaskaskia Island Drainage and Levee District, and by virtue of a certain levee and drainage construction, the said tract of land was greatly benefitted, and that said tract of land is liable for certain special assessments against it and payable to the treasurer of the said Kaskaskia Island Drainage and Levee District; therefore in consideration of the premises the defendant, Charles R. Bartels and the said Emery Andrews were liable for the special assessment for the years 1918 and 1917 assessed against said land and due and payable to the Kaskaskia Island Drainage and Levee District, yet being so liable as aforesaid have failed to pay the same and the plaintiff, Joseph F. De Roussee, to save his own interest in the above tract of land paid the same at their request, in consequence whereof the defendant, Charles R. Bartels then and there became severally liable to the plaintiff in the sum of forty-one dollars and eighty one cents paid by the plaintiff to the Kaskaskia Island Drainage and Levee District for the Special Assessment against said tract of land for the years 1918 and 1917, and being so indebted, the defendant in consideration thereof then and there promised the plaintiff to pay him the said sum of money on request.

Appellant filed a general and special demurrer to this declaration, which was overruled, and he stood by his demurrer. Judgment for $41.81 was entered in favor of appellee.

It is contended by appellant that when the lease under which appellee holds was executed the lands in question were public lands, and the fee therein was not subject to any kind of taxes, either general or special, but that immediately upon the execution of the lease, the leasehold interest became sub-

ject to all general and special taxes, and the lessee would have them to pay even though nothing was said about it in the lease. He further contends that the provision of the lease by which the lessee agreed to pay "all assessments for taxes for all purposes that may be assessed against said premises according to law, during the continuance of said lease", meant and included all special assessments which might be legally assessed against the premises, and that therefore the lessee was legally bound to pay the special assessments against the premises legally made by the drainage and levee district as stated in the declaration.

Appellee on the contrary claims that special assessments were not included by the language used in the lease and that when appellant failed to pay those assessed against the premises for the two years named, he, appellee had a right to pay them, as he did, and to recover the amount so paid from appellant. It is to be observed that the amended declaration alleges that the amount sued for, and for which judgment was given, was paid by appellee at appellant's request, and that afterwards appellant promised to repay him. Appellant's demurrer admitted these allegations, which in our opinion stated a good cause of action. Appellant stood by his demurrer when it was overruled and the case now comes before us on the common law record, without any evidence. This court must then presume that the trial court heard sufficient evidence to sustain the allegations of the declaration and support the judgment. If appellant desired to raise in this court the questions argued in his brief, which are above briefly stated and which involved questions of fact as to the history of the case he should have offered proof or there should have been a stipulation of facts and the same should have been presented by a bill of exceptions. As these facts are not in the record there is no way for us to ascertain them and therefore, upon the record before us, the judgment must be affirmed.

Affirmed.

Not to be reported in full.

Petition for rehearing Denied 4/5-1922

Term No. 16 Agenda No. 27

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

March Term, A. D. 1921.

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MODEL LAUNDRY CO.,
Appellee,

vs.

C. F. SHORT COMPANY,
Appellant.

Appeal from
City Court of
East St. Louis.

223 I.A. 629

Opinion by Barry, J.

In an action on the case Appellant was charged with having driven its moving van through a private alley on the property of Appellee, and in doing so it struck a certain guy wire which was attached to and supported the smoke stack on its building, thereby causing the said stack to fall and to damage the building, rendering it necessary to close down the laundry for a certain time etc., all to the damage of Appellee to the sum of $1,000.00.

The general issue was pleaded and the jury returned a verdict for $533.50, and a motion for new trial having been overruled judgment was entered for that amount. The motion for new trial set out that the Court erred in admitting improper evidence on behalf of Appellee, and in excluding proper evidence offered by Appellant, and that the verdict is against the weight of the evidence.

No complaint was made as to the giving or refusing of instructions, or that the verdict is excessive.

It is contended by Appellant that there is absolutely no evidence of negligence on the part of its driver. The evidence shows that the lower end of the guy wire was fastened to a post or iron bar about five feet from the ground and extended in an upward slanting direction to where it was attached to the stack. The evidence tends to show that the top of the van was thirteen feet from the ground. The driver admitted that as he passed under the wire it was on the post and that when he saw it next it was off the post. At least one witness on behalf of Appellee testified that the van struck the wire and tore it loose, and that the stack then toppled and fell. The stack had stood in proper position for years and no claim is made that it fell because of a high wind. It would be difficult for a jury or the Court to reach any other conclusion than that there was not sufficient room for the van to pass under the wire without striking it, and that if the driver was exercising due care he would have observed that such was the situation before he attempted to drive under it.

It is our opinion that the question of negligence was purely one of fact for the jury, and we would not be warranted

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Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

in holding that their decision on that question was manifestly against the weight of the evidence.

It is also contended by Appellant that there is no proper evidence as to damages sustained. While we are not entirely satisfied with the character of the evidence on that question, yet, in as much as no Complaint has been made to the effect that the verdict is excessive we are inclined to think that no useful purpose would be subserved by a reversal on that ground, and the Judgment is affirmed.

Affirmed.

Not to be reported in full.

~~Petitions for rehearing denied 4/5-1922~~
Motion for extension of time to file Petitions for Rehearing denied.

1921

Term No. 27 Agenda No. 33

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921

ROBERT GOTT, et al,
Appellees.

vs.

THE CLEVELAND, CINCINNATI CHICAGO & ST. LOUIS RY. CO.,
Appellant

Appeal from White County Circuit Court.

Rehearing denied 3-30-22

223 I.A. 629

Opinion by Barry, J.

This is an appeal from a judgment for $118.23 in favor of Appellees, and is based on a claim that they sustained damages on a shipment of dressed poultry and eggs received by Appellant at Norris City, Ill., to be carried to Philadelphia, Pa., and there delivered to A. N. Risser Co. The shipment consisted of 16 barrels of poultry, iced, and four cases of eggs and started on its journey on Nov. 14, 1917. In the ordinary course of business it would have reached its destination in four or five days, but on this occasion it arrived on Nov. 23, 1917.

Upon arrival at Philadelphia the agent of the connecting carrier learned that Mr. Risser had committed suicide and that the company was insolvent and delivery could not be made. An effort was made to notify Appellees and to get instructions as to what disposition to make of the consignment, but notice did not reach them until Nov. 29th, 1917, which was Thanksgiving Day. The shipment was intended for the Thanksgiving market, and it was then too late, so Appellees declined to give instructions but later directed that it be turned over to Walker and Rice. They sold the poultry and eggs on Dec. 5th.

The connecting carrier placed the shipment in cold storage on Nov. 24th, where it had remained until turned over to Walker and Rice. By reason of the delay in getting the property to destination and in giving Appellees notice of inability to deliver, the poultry had changed from "fresh killed, iced in barrels" to "cold storage stock", and the eggs from "fresh eggs" to "refrigerator egg.s" The result was that they did not bring as much when sold as they would have brought before the change.

At the trial a jury was waived, and the Court found the issues for Appellees and rendered judgment for $118.23. All of the propositions of law offered by Appellant were marked "held" by the Court, except the first which was refused.

Appellant contends that the Court erred in refusing that proposition, but as we view the facts disclosed by the record, the Court committed no error in that regard. The law applicable to

the facts in this case is fully set out in Mich. Central R. R. Co., vs. Harville, 136 App., 243, and Edson Keith & Co., vs. The A. T. & S. F. Ry. Co., 192 App., 350.

Appellant also contends that the findings of the Court are inconsistent with the propositions of law held by the Court in its favor. The Court simply held the law to be as declared in the propositions, but that the facts did not make a defense for Appellant. We are of the opinion that the Court might have very well refused all of the propositions of law on the theory that they did not apply to the facts of the case.

In our opinion, the findings and judgment of the Court are fully sustained by the evidence, and that substantial justice has been done. The judgment is affirmed.

Affirmed.

Not to be reported in full.

Petition for rehearing Denied 3/30-1922

Term No. 12 Agenda No. 23

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921.

WILLIAM F. VAN BUSKIRK,
Appellee.

vs

EDWARD B. CLARK,
Appellant.

Appeal from
Circuit Court
Pope County.

223 I.A. 629 4

Opinion by Boggs, J.

An action in assumpsit was instituted by appellee against appellant in the Circuit Court of Pope County to recover a balance alleged to be owing on a note of $1200. executed by appellate to the Commerce and Savings Bank of Chicago and by said Bank alleged to have been endorsed to appellee in due course. The declaration consists of one special count and the consolidated common counts. The special count was the ordinary count in suit brought by endorsee against the maker of a promissory note. To this declaration appellant filed the general issue and four special pleas. The first special plea averred that the note in its inception was given under an arrangement contrary to public policy in order to thwart and frustrate the State Bank Act; that appellee, Van Buskirk and one Grissom at the time of the making of a certain note on which the one sued on was a renewal, were promoters of The Bank of Commerce and Savings; that Grissom and appellee were to become the officers of the new Bank and did become such officers, appellee the president and Grissom the cashier and vice president; and that they had the management of its affairs at all times from its organization to the filing of said suit; that at the time of the giving of said note it was agreed "that same was not to be operative as a promissory note; that defendant should never be called upon to pay it; that Grissom assured defendant his subscription was for the purpose of making it appear that the required amount of stock had been regularly and lawfully subscribed and said note was only to be held until the bank was organized, the stock sold to other parties and the plaintiff's note returned to him."

The second special plea alleged the same state of facts relative to the promotion and organization of the bank by Grissom and appellee; etc., and then alleged that a bank examiner had objected to said note being listed among the bank's assets because it was for the same amount as the amount of stock standing in appellant's name; that as a result of such objection, Van Buskirk made a fictitious endorsement as president of said note to himself and that Van Buskirk was not the holder in due course, but a mere volunteer.

The third special plea alleges that Grissom obtained sub-

scriptions for the stock of said bank from other persons, taking their notes and that the bank released said persons therefrom, returning their notes to them after the bank's organization and while Grissom and Appellee had the management thereof; and charges that such release of said persons operated to discharge appellant from liability on the note he had given. All of said special pleas above mentioned aver that appellee had knowledge of said arrangement with appellant or had the means of obtaining such knowledge and that said bank retained said stock subscribed by appellant and held a power of attorney to dispose of the same; that appellee had knowledge that appellant's renewal note was executed and delivered upon the same understanding and arrangement that existed when he executed the stock subscription note and that such renewal was executed while Grissom and appellee were in charge of the affairs of the bank, or that they had the means of obtaining such knowledge. The fourth special plea filed by appellant was a plea of payment.

Replications were filed to said special pleas and issue was joined. A trial was had resulting in a verdict in favor of appellee for $758.82. Motions for a new trial and in arrest of judgment were made by appellant and were overruled by the Court. Judgement was entered against appellant for said amount and costs . To reverse said judgment this appeal is prosecuted.

Counsel for appellant in his brief raises the following propositions which he insists arise on the record, viz: whether or not appellee was a holder in due course; whether or not appellee was the owner of the note in question in due course; whether or not he acquired said note as a mere volunteer; and whether or not there is sufficient facts in the record to support the plea of payment.

There is nothing in the record to show affirmatively that appellee did not receive the note in question in due course. The evidence on the part of appellee tends to show that the original note, of which the one here sued on is a renewal, was taken by a man by the name of Grissom who was procuring subscriptions to the capital stock of The Bank of Commerce and Savings, and that said note was in the sum of $1200. for ten shares of the capital stock of said bank at $120. per share. Said note was made payable to said Bank and accompanying said note was a power of attorney signed by appellant authorizing the sale and transfer of said stock. While said note was held by the Bank it fell due and appellant gave the note here in question as a renewal thereof. During the time said note was so held by the bank, five of the shares of stock held by appellant were sold by appellee for $600. and credit was given on the note in question therefor.

It is the contention of appellant that Grissom with the knowledge and authority of appellee was authorized to take subscriptions to the capital stock of said bank, the parties subscribing to give their notes therefor with the understanding that the notes should not be paid and that when the stock was all subscribed and the bank organized, that the notes so taken should be returned to said subscribers. It is further contended that the power of attorney accompanying said notes was for the purpose of authorizing the disposal of said stock to other parties so as to effect a release of said subscribers who had given their notes as above mentioned.

The evidence, however, fails to support this theory of the

case. The only witness testifying on behalf of appellant was appellant himself, and while he testified it was the understanding he had with Grissom that when he signed the note, (of which the note here sued on is a renewal) it should be returned to him and that he knew of his own knowledge that the notes given by two or three other parties for stock subscribed by them had been returned. He did not testify, nor is there any evidence in the record to the effect that appellee had anything to do with this arrangement or that he even had knowledge of the same.

The evidence on the part of appellee is to the effect that the note originally given by appellant, of which the one sued on is a renewal, was given to the bank in payment for ten shares of the capital stock subscribed by appellant; that said stock was issued but was not delivered to appellant and that a power of attorney authorizing a transfer of said stock was given by appellant and was held with said note. Appellee further testified that when the original note fell due that appellant gave the note here in question in renewal of the same. Appellee further testified in effect that an officer of the clearing house in examining the notes held by the bank objected to this note for the reason that it was for the exact amount of the purchase price of the stock subscribed by appellant and that the bank ought not to take or hold a note of that character. That by reason of this criticism he, appellee, took up said note, paid the bank in full therefor and as the president of said bank endorsed said note and held the same as endorsee. Several letters were offered in evidence by appellee from appellant touching this transaction. In all of said letters or writings with reference to the original note (of which this note is a renewal) appellant made no question as to its validity or as to his liability thereon. This correspondence run through a period of some two or three years and never until after this suit was instituted did appellant say anything in any letter with reference to the arrangement which he now claims was had between him and Grissom with reference to the giving of the original note. An attorney representing appellee testified that before bringing suit on the note here in question he took up with appellant the matter of payment of said note and that appellant did not question his liability thereon but insisted that if given time he would be able to take care of the same. We are therefore of the opinion and so hold that the evidence in the record wholly fails to show that appellee did not come into possession of said note in good faith. Knolt vs. Conright, 202 Ill. App. 502; Page vs. Hallam, 212 App. 462.

It is also contended by appellant that appellee in the taking over the note in question was a mere volunteer. In other words, appellant contends that inasmuch as he did not request appellee to take up said note and appellee being the president of said bank, his taking it over made him a mere volunteer and not a holder in due course. We do not think this point well taken as the evidence shows appellee paid full value for the note; and the same was taken up by him by reason of the fact that the officer examining the securities held by the bank objected to it.

The further question is raised by appellant as to whether or not the evidence in the record was sufficient to show payment under the plea of payment. There is no evidence in the record to show payment of this note, except as to the $600. heretofore referred to.

It is further contended by appellant that the court erred in refusing to allow testimony to the effect that Grissom had

promised one Calkins and one Rose, subscribers to the capital stock of the bank in question, that their notes would be returned to them, and that said notes were so returned. While the court did sustain objections to evidence of this character when first offered, later on appellant was allowed to testify he personally knew that the notes given by Calkins and Rose on subscriptions to said Bank were returned to them, so appellant had the benefit of this testimony. Appellant, however, on cross examination stated in answer to the question as to whether or not the stock issued in the name of Calkins and Rose had been sold and the proceeds used to pay off their notes at the time they were returned said, he did not know as to that.

Appellant further argued that the value of the remaining five shares of stock issued to him and held with the note of appellant, should be disposed of and the proceeds applied on the note. There is no contract between the holder of the note and appellant that this should be done. Of course, if appellant had paid the note, he would have been entitled to the return of these shares of stock and that same situation exists at the present time.

It is also contended by appellant that the court erred in refusing the eight instructions tendered by him on the trial of said cause. No instructions were given on the part of appellee and all of the instructions offered by appellant were refused by the court. We have examined these instructions and so far as they state correct principles of law, they are not applicable to the facts contained in the record. Other of the instructions that were refused by the court did not state correct principles of law. The court therefore did not err in its rulings on the instructions.

Appellant further contends and argues in his brief that the verdict and judgment in this case is excessive. An examination of the record disclsoes that the amount of the verdict and judgment is less than the principal and interest would amount to if figured to the date of the rendition of judgment at the rate of interest set forth in the note.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Petition for Rehearing Denied 4/5-1922

Term No. 26. Agenda No. 11

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921.

J. P. MURPHY,
Appellee,
vs.
JOHN BARTON PAYNE,
Director General of Railroads, as Agent,
Appellant.

Appeal from
Circuit Court
Gallatin County.

223 I.A. 630

Opinion by BOGGS, J.

Suit to recover damages for the loss of five hogs in a shipment made by appellee on April 22nd, 1919, from Equality, Illinois, to the National Stock Yards at East St. Louis over appellant's railroad, was brought by appellee against appellant before a Justice of the Peace, and on appeal therefrom to the Circuit Court of Gallatin County, a trial was had, resulting in a verdict and judgment for $145. in favor of appellee. To reverse said judgment this appeal is prosecuted.

It is first urged by appellant for a reversal of said judgment that the trial court erred in refusing to exclude the evidence and direct a verdict in favor of appellant at the close of appellant's evidence or at the close of all the evidence; motions for that purpose having been made. It is only necessary for us to say that in our opinion the evidence of appellee taken with all inferences legally to be drawn therefrom made out a case for appellee and would have supported a verdict in his favor. The court therefore did not err in denying said motions.

It is next contended by appellant that the court erred in permitting appellee to testify, that on account of an alleged delay in the shipment he was compelled to pay an extra feed bill of $21. and that such delay would result in a shrinkage in the weight of the hogs and a consequent loss to appellee. An examination of the record fails to show that the testimony in question was properly objected to. In fact, counsel for appellant practically so concede in his argument as to the shrinkage caused by delay in shipment. We therefore hold that there was no reversible error in the ruling on the evidence.

The next and principal ground urged by appellant for a reversal of said judgment is that the verdict is against the manifest weight of the evidence. It being the contention of appellant that the death of the hogs in question was not the result of negligence or lack of care on his part, but was caused on account of the hogs being over-crowded in the car and on account of the hogs being driven to the shipping place for loading.

The evidence discloses that appellee is a farmer, stock-

Rev'd & remanded
3-30-22

raiser and stock buyer; has had about three years experience in shipping stock. The shipment in question contained eighty-three head of hogs; fifty of which appellee had fed on corn for ninety days and thirty-three of which he purchased about three days before said shipment was made. All of the hogs were in good flesh and would average about 200 pounds. The testimony of appellee and his witnesses tends to establish that the shipment was made in a thirty-eight foot car, while that of appellant was that it was only a thirty- six foot car. Appellee and two other men loaded the hogs and another party saw the hogs after they were loaded, and all testified that the hogs were healthy and in good condition when loaded and were not crowded in the car. When the car arrived at the National Stock Yards it was found that five of the hogs were dead. The hogs were shipped in Pennsylvania R. R. car No. 647327.

Albert Smith, an inspector for the Western Weighing and Inspection Bureau testified on behalf of appellant that he inspected Pennsylvania R. R. car No. 643737 on April 23rd, 1919 and found five dead hogs which he numbered 31554-5-6-7 and 8 by fastening metal discs in the ear of each hog. W. J. Embree, a veterinary surgeon for the same company testified for appellant, that he had inspected the dead hogs bearing the above numbers after they were viscerated or cut open and that none bore any internal marks or bruises or other evidence of violence, but that all but one of said hogs bore evidence of having died of acute congestion of the lungs. The remaining one from pneumonia. He further testified that an animal that has been kept on heavy feed for fattening, atrophies in the vital organs; that it becomes lazy and will not exercise and that a walk of a quarter of a mile will cause it to puff and pant because it is not used to it. He also testified that the crowded condition of a car will tend to produce a congestion of the lungs which transportation to the pens had started. Said veterinary's conclusions were that 83 hogs in a 38 foot car would be crowded and that the five hogs died from the causes he gave as a result of being driven to the stock pens and the alleged subsequent crowded condition of the car.

It will be observed that the witness Smith testified that he inspected car No. 643727 and there found the five dead hogs in whose ears he inserted the metal discs and these are the hogs which the veterinary also inspected. The hogs in question were shipped in car No. 647327 according to a preponderance of evidence. It is therefore not altogether certain that the inspector saw or was testifying about the five hogs of appellee. Even if it be assumed that the hogs inspected were the hogs of appellee, still the cause of their death is a question of fact for the determination of the jury. The jury found adversly to the contention of appellant, and we are not dis posed to disturb their finding.

Proof of delivery of live stock in a live and good condition and its death while in the custody of the carrier, makes a prima facie case against the carrier, subject to be rebutted by proof that the death of such live stock was not the result of a failure on the part of the carrier to exercise the degree of care which the nature of the property required. Burke v. Express Co. 87 Ill. App 505-508; Ry Co. vs. Fox 113 Ill. App. 180-184; Ry. Co. v. Johnson 114 Ill. App. 545-554; Gilchrist v. C. &

A. Ry. Co. 158 Ill. App. 117-118. In our judgment the verdict is not against the manifest weight of the evidence and the trial court did not err in so holding.

Lastly it is contended by counsel for appellant that the court erred in its rulings on the instructions. Two instructions were given for appellee and seven for appellant. There was no serious error in the giving of instruction No. 2 for appellees, being the only given instruction complained of. There was only one instruction offered by appellant that the court refused and counsel for appellant practically concedes in his argument that its refusal did not affect the result of the verdict. There was therefore no serious error in the ruling on the instructions.

Finding no reversible error in the record the judgment of the trial court is affirmed.

Judgment affirmed.

Not to be reported in full.

Petition for rehearing denied 3/30-1922

Term No. 51 Agenda No. 20

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921.

TILLIE McDONALD, Administratrix of the Estate of William C. McDonald, Deceased, Appellee, vs.. ST. LOUIS, SPRINGFIELD AND PEORIA RAILROAD, Appellant.	Appeal from the Circuit Court of Madison County.

223 I.A. 630

Opinion by Boggs, J.

This case comes to this court on Appeal from a judgment for $6,000.00 rendered by the Circuit Court of Madison County in favor of appellee as administratrix of the estate of William C. McDonald, deceased, and arose out of an accident in which a passenger train of appellant collided with the automobile of appellee's decedent at a railroad crossing in the unincorporated village of Hamel. The Declaration consists of three counts. The first count charges general negligence; the second count charges the operation of said train at a high and dangerous rate of speed; and the third count charges failure to give any proper signal or warning of the approach of said train to said crossing. All of said counts have an averment of due care on the part of appellee's intestate. To said declaration appellant filed a plea of the General issue.

The Village of Hamel consists of a saloon building, a dance hall, two stores, a garage, a grain elevator, appellant's station and a few dwelling houses. The highway on which the accident occurred runs due East and West. Appellant's railroad crosses this highway at an angle of practically forty-five degrees and runs in a northeasterly and south westerly direction through said village. Said saloon building is on the north line of said highway fronting south, its northeast corner being fourteen feet and three inches from the west rail of appellant's track. Between the saloon building and the track is a trolley post having a diameter of about one foot. The saloon building abutting on the highway is twenty feet and three inches wide, and eighteen feet and ten inches west of said saloon building is a coal shed. Between the coal shed and saloon building is an alley or drive way and at the north end of said saloon building is an "L" extending into said alley. Back and North of said saloon building are other buildings, obstructing the view of appellant's track to a person approaching from the west. The highway is sixty feet wide at this point. At about the center of the highway, at the point where appellant's track crosses the same, planks fourteen feet long are laid between and parallel to said rails. On the south side of the highway and within ten feet of the west rail of appellant's track is a stop signal or signal post. This stop sign or signal post is directly south and on a

line with the east side of said coal shed. The west line of the saloon building extended south across the highway would intersect the center of appellant's track at a point ten feet south westerly from the end of the plank crossing. This crossing has been found and been designated to be an EXTRA HAZARDOUS CROSSING by the Public Utilities Commission.

The decedent, William C. McDonald drove his Ford automobile to Hamel on the day of the accident and parked it in the alley or yard at the west side of said saloon building. He made a trip to Edwardsville on appellant's road and returned on the 4:30 car. Shortly thereafter, appellee's intestate was seen backing his car out of said alley. The record discloses it had been raining and he had the side curtains up. He backed his car towards the west and came to a full stop, with his front wheel about twenty feet west of the west rail of appellants tracks. This brought his car directly north or immediately opposite said stop sign. The decedent then drove his automobile towards the crossing at a slow rate of speed and was struck by appellant's train on the crossing.

The evidence in regard to the speed of the train and the signals given is conflicting. The evidence for appellee shows that the car was travelling from thirty to forty miles an hour and that no warning signals were given except the danger signal immediately before or simultaneously with the crash. The evidence for appellant is to the effect that signals were given five hundred or six hundred feet north of the crossing and some of the witnesses testified that the regular station and the danger signals were also given. The motorman on said train testified that he did not see the automobile until his car was within about twenty-five feet of the crossing.

When said automobile was struck, it was pushed down the track a distance of three hundred seven feet, while the brakes were set and the wheels sliding. The decedent was taken from his automobile in a mangled condition and removed to a hospital where he afterwards died.

Four special findings were submitted to and were answered by the jury together with their general verdict finding the issues for appellee and assessing her damages, etc. The answers to the special interrogatories were consistent with the general verdict. A motion for a new trial made by appellant was overruled by the Court and judgment was rendered. To reverse said judgment this appeal is prosecuted.

It is first contended by appellant for a reversal of said cause that appellee's intestate was not in the exercise of due care for his own safety just prior to and at the time of the accident. The conditions surrounding the crossing in question are somewhat unusual. An examination of this crossing as disclosed by the plat designated defendant's exhibit 1 will disclose that while the stop sign on the west side of the track is only ten feet from the nearest rail, a person in the center of the highway directly opposite this sign would be at least thirty feet from the center of the crossing, travelling on the center line of the highway. In approaching this crossing all that the law would require is that the decedent use such care as a person of ordinary prudence would exercise under the same circumstances. Winn. vs. C. C. C. & St. L. Ry. Co. 239 Ill. 132. The statute requiring that a person travelling on a public highway at a dangerous railway crossing must bring his vehicle to a complete stop at

, stopped his automobile opposite said stop sign thereafter

the stop sign is for the purpose of giving him an opportunity to observe the conditions of the surroundings in regard to a passing train. We hold that appellee's intestate having stopped his automobile opposite said stop sign, the law would not require him to again put his machine in motion and drive it around to the same position and stop it again in order to comply with the law.

The only witness in this record who testified as to the position of the decedent after backing his machine out of the driveway and facing it east preparatory to crossing appellant's track says that when he had completed this operation and stopped his machine the front end of his machine was within twenty feet of said crossing. The record discloses that the decedent was at the center or north of the center of this highway, and there is no point in a line drawn through the stop signal perpendicular to the center of the highway, which is within twenty feet of said crossing. The decedent therefore was complying with the law when he stopped his machine where he did before he attempted to make this crossing.

On the general proposition as to whether appellee was in the exercise of due care for his own safety, just prior to and at the time of the accident, it should be borne in mind that on the north side of said highway was said coal shed and saloon building and a large telephone pole, and that the southeast corner of said saloon building was only fourteen feet, three inches, from the west rail of appellant's track. It was therefore impossible for appellee's intestate to observe a train coming from the northeast, on appellant's track, until after he had passed this saloon building. One of appellant's witnesses testified to having made certain measurements and observations with reference to the ability of a person to see a train coming from the northeast. This witness testified: "I was fourteen feet west of the westerly rail and saw up the track five or six pole lengths, poles one hundred feet apart. As I approached the crossing going east I could see further up the track; standing in a line with the stop sign that is the same distance west of the track and opposite the plank crossing I could see seven hundred or eight hundred feet up the track."

The testimony on the part of appellee is to the effect that the appellant's train approached this crossing running from thirty to forty miles per hour. On the part of appellant the witnesses fixed the rate of speed at from fifteen to twenty-five miles an hour. The record, however, discloses that the brakes were applied by the motorman when his train consisting of two cars was within fifty to a hundred feet of the crossing and the car ran 307 feet south of the crossing before it was stopped. The jury would therefore be warranted in drawing the conclusion that appellant's train as it approached said crossing was running from thirty to forty miles an hour. We think, therefore, in view of all the circumstances surrounding appellee's intestate just prior to and at the time of the injury, it was a question of fact for the jury as to whether or not he was in the exercise of due care for his own safety.

In Passwaters vs. L. E. & W. Ry. Co. 181 App. page 44, being a Third District case, and being a case where the court had under discussion a question of due care, similar to the one now under consideration, at page 47 says: "The train was three or four minutes behind time and was running at from 55 to 60 miles an hour. It is contended on behalf of appellant that the

deceased was not in the exercise of due care. The crossing is shown by the evidence to be a very dangerous one for a traveler coming from the north. A train coming from the west could not be seen because of the hedge and the knoll, until the traveler was thirty-five feet from the track and then only for a short distance along the track toward the west. Appellant's counsel state that thirty-two feet from the crossing a traveler could see two hundred to two hundred and fifty feet when looking west, and a little less than twenty-one feet he could see beyond the whistling post. A train traveling sixty miles an hour goes at the rate of eighty-six feet per second. When the train was two hundred and fifty feet distant it could not be seen by a traveler on the highway thirty-five feet from the crossing and if a traveler at that distance from the crossing should then look and listen he might neither hear nor see it, and yet in less than three seconds it might be on the crossing. There is no law in this state limiting the rate at which a train may run in the country, and a railroad may run its trains at any speed thought proper consistent with the safety of travelers, who are attempting to cross the highway crossing in the exercise of due care for their own safety, and with the safety of its passengers and employees. Partlow vs. Illinois Cent. R. Co. 150 Ill. 321. Wesley James and the foreman of the grading gang, although half a mile distant, saw the deceased drive on the track. The evidence does not show either that the deceased looked and listened or that he failed to look and listen before driving on the track. It is manifest that the witnesses, who saw him, one being a half a mile behind him, and the other half a mile in front of him, could not see what he did, and a failure to look and listen is not necessarily such contributory negligence as will preclude a recovery. Dukeman vs. Cleveland, C. C. & St. L. R. Co., 237 Ill. 104."

As the evidence clearly shows appellee was driving at a slow rate of speed as he approached said crossing and as the evidence is conflicting as to whether or not appellant blew any whistle or gave any warning of the approach of its train prior to reaching said crossing except the danger signals that were given when the train was only from fifty to a hundred feet from the crossing, we are not prepared to say that the finding of the jury that appellee was in the exercise of ordinary care for his own safety is against the manifest weight of the evidence.

It is next contended by appellant that the record fails to show that appellant was guilty of the negligence charged in appellee's declaration. As heretofore stated, the evidence is conflicting as to whether or not appellant gave any warning of its approach to the crossing in question, other than the danger signals that were given just before the train reached said crossing and is conflicting as to the rate of speed said train was going at said time. We think therefore in view of the dangerous condition of this crossing the jury were warranted in finding that appellant thru its servants was negligent in the operation of its said train as it approached the same.

It is next contended by appellant that the court erred in refusing to permit Hall, a civil engineer, to testify as to the least possible distance a Ford automobile could be from said crossing after having been backed out of said passage way. There was no error in the court's ruling in said matter.

It is next contended the court erred in permitting an improper cross examination of conductor Ernst and motorman

Williams. So far as the record discloses there was no objection made to the cross examination of Williams on which to base this assignment of error. As to the cross examination of the witness Ernst, we think it was warranted as it had to do with statements he was supposed to have made prior to testifying in said cause that were inconsistent with his testimony on the stand. The court did not err in its rulings in this regard.

Complaint is also made that the court refused to rule in the presence of the jury on the action of appellee in sobbing and displaying her grief. The ruling of the court was made out of the presence of the jury; the court stating that appellee's show of grief was not unreasonable or excessive and did not continue through the entire argument. No error was made by the court in its rulings thereon.

It is next contended by apellant that the court erred in failing to give appellant's refused instruction No. 2. Twenty-two instructions were given by the court on behalf of appellant. The given instructions covered every phase of appellant's case. So far as refused instruction No. 2 contained correct principles of law, they were covered by the instructions given. The court did not err in refusing to give this instruction.

It is next contended that there was no sufficient proof of the death of appellee's intestate. William Hosto, a witness for appellee testified that when the electric car stopped the automobile was under the pilot of the car and that it could not be removed until the electric car was backed up. That McDonald, appellee's intestate, was doubled up in the machine and "looked like he was mangled up." The witness thought he was dead and observed no signs of life. We hold the evidence sufficient to show that the intestate died from the effects of injuries received in said collision.

Lastly it is contended by appellant that the verdict of the jury is excessive. The evidence shows that the intestate was fifty years of age, in good health and active and had been pursuing his calling as an auto liveryman. He left a widow and three children. The evidence in our judgment was sufficient to warrant the amount of the verdict.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported in full.

3/30-1922- Opinion modified and rehearing Denied

see Modification on page two.

Term No. 25. Agenda No. 12.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, 1921.

WILLIAM PHILLIPS,
Defendant in Error.

vs.

WILLIAM H. BECKER,
Plaintiff in Error.

Error to
City Court
East St. Louis.

BARRY, J.

Defendant in Error sued to recover $10,000.00 for personal injuries occasioned by an automobile owned by plaintiff in error while it was being driven by one Leo Martin. The general issue was filed and also a special plea which denied that the driver of the car was the agent or servant or that he was engaged in or about the business of plaintiff in error at the time in question. The jury returned a verdict for $15,000.00, from which defendant in error remitted $5,000.00. The Court then overruled the motion for a new trial and rendered judgment for $10,000.00.

The issue raised by the special plea was the only controverted question in the case and the burden of proof was upon th defendant in error. He sought to prove that issue by showing that Mr. Martin had been seen driving plaintiff in error's car at other times and also by proving alleged admissions by plaintiff in error and Mr. Martin to the effect that at the time of the accident the latter had gone on an errand for the former. They denied having made such admissions and testified to facts that would support the special plea, thus making a sharp conflict in the evidence on that most vital issue.

Defendant in error was permitted, over objection, to detail a conversation with Mr. Becker, substantially as follows: That Mr. Becker told him he had plenty of insurance on his car. That Mr. Becker asked him what he would take to settle and that he told Mr. Becker the amount. That Mr. Becker said he wanted to know exactly what offer of settlement defendant in error had made to Mr. Berth, the insurance man, who had been to see defendant in error at the hospital at least six times and once at his home. That when Mr. Becker told defendant in error he had plenty of insurance and wanted to settle, etc., defendant in error told him all right, but he never saw Mr. Becker again until he saw him at the first trial of the case. The evidence was objected to on the ground that it was relative to a compromise or settlement of the case, and the overruling of the objection was reversible error. Barker vs. Bushnell, 75 Ill. 220.

The jury would naturally consider it as most cogent evi-

dence of an admission by Mr. Becker that Martin was his agent or servant at the time in question. It was evidently intended, also, to inform the jury that Mr. Becker had insurance and that the insurance company would have to pay whatever judgment might be recovered. It is not strange, therefore, that the verdict was for $5,000.00 more than the amount sued for. No objection was made to the testimony on the ground that it was improper to show that plaintiff in error was insured and it is too late to raise that objection in this court.

Counsel for defendant in error contends that independent admissions made during an effort to compromise may be given in evidence against the party making them; at least, unless they are expressly stated to be made in confidence or without prejudice. Domm vs. Hollenbeck, 142 App. 439. While that is true, the record shows that just prior to the testimony above referred to, defendant in error testified that plaintiff in error told him that he was sorry that the former was injured and that he, plaintiff in error, had sent Mr. Martin down town on an errand. So it clearly appears that counsel were not satisfied with proving the independent statement or admission, but insisted, over objection, to show the talk in regard to compromise and insurance.

It will be seen, therefore, that the question of insurance was brought in by counsel for defendant in error in the direct examination of the witness. It also appears that in the direct examination of another witness for defendant in error, counsel went into the question of insurance by proving that plaintiff in error said to the witness that at first, in talking about the accident, he did not say that Mr. Martin had taken the car without permission at the time of the accident, because he, plaintiff in error, had been informed that in such case his insurance would be forfeited.

In view of the many decisions of our Supreme Court holding that any reference to the fact that a defendant is insured should not be permitted, we are at a loss to understand why counsel should jeopardize any verdict that might be recovered by making such proof.

The instructions to the jury on behalf of defendant in error directed a verdict on proof of negligence generally without confining it to that charged in the declaration. Instructions not limited to the negligence charged in the declaration have often been condemned and on a retrial this error should be avoided. We are not to be understood as saying that the instructions should refer the jury to the declaration to ascertain what negligence is charged against the defendant. The instructions should define the issues to the jury without referring them to the pleadings to ascertain what they are; Bernier vs. I. C. R. R. Co., 296 Ill. 464.

The judgment is reversed and the cause remanded.

Reversed and Remanded.

Not to be reported in full.,

150 - 2591

RALPH A. BRAIN,
Appellee,

vs.

LA GRANGE STATE BANK,
a Corporation,
Appellant.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

223 I.A. 630

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment entered against it in the County court of Cook County in favor of the plaintiff for $1,000.

The action was in trover for an alleged wrongful conversion on April 4, 1918, of an automobile, the property of the plaintiff. April 3, 1918, the defendant obtained a judgment against Arthur J. Smith and Grace M. Smith upon a matured and unpaid promissory note dated October 11, 1917. An execution issued on the judgment was placed in the hands of the Sheriff on April 4, 1918, and upon the same day the sheriff levied upon an automobile at Keck's garage in La Grange. The sheriff advertised the property for sale to be held on April 15, 1918. No bidders being present on that date the sale was postponed to April 25, 1918, when the property was sold to a bidder for $400.

The facts of the case, as shown by the evidence, are in substance as follows: The automobile levied upon was purchased by plaintiff in 1915 for the sum of $2223.40. He thereafter drove it about 13,000 miles when, expecting to enter the United States military service, he delivered the car to Schillo Motor Car Company of Chicago for sale. The Schillo Motor Car Company's place of business was on south Michigan avenue, and its manager,

Edwin W. Schillo, delivered the car for storage to his father, Adam Schillo, who operated a garage on North avenue, Chicago. The plaintiff, Drain, and Arthur J. Smith, friends of two or three years standing, met January 26, 1918, and in the course of conversation between them plaintiff offered to sell his car to Smith. In the company of one Benson they went to Adam Schillo's garage and after inspection of the car plaintiff and Smith entered into an agreement for its purchase by Smith. The agreement was oral, and, as shown by the uncontradicted testimony of plaintiff, was to the effect that Smith agreed to purchase the car for $1,000. In testifying the plaintiff said:

> "He asked me what I wanted for the car. I told him a thousand dollars, and he said he would buy it if we could make the terms right. I asked him what they were, and he said he would pay me a thousand dollars for it, a hundred dollars down and a hundred dollars a week until it was paid for. The car was to remain there until it was paid for."

Plaintiff did testify that he told Adam Schillo to deliver the car to Smith when he called for it, but his undisputed testimony is also to the effect that he and Smith agreed that the car was to remain in Schillo's garage until it was fully paid for. At the time the agreement was entered into Smith gave plaintiff a check for $100, drawn upon defendant bank, which refused to pay the check when presented for payment. January 31, 1918, the check was protested for non-payment and returned to plaintiff. Shortly thereafter in the early part of February, plaintiff met Smith in Chicago and showed him the protested check. Plaintiff testified that at that time he said to Smith:

> "If he couldn't make the first payment, if he couldn't pay that, we should call the deal off. I told him the deal was off. That was all then. I just called the-- called the deal off."

The evidence is undisputed that up to this time Smith had not obtained possession of the car. February 19, 1918, or shortly before that date, Smith, while intoxicated and without

Edwin W. Bonilio, delivered the car for storage to his father, Adam Bonilio, who operated a garage on North avenue, Chicago. The plaintiff, Hunt, and Arthur J. Smith, from de of two or three years standing, met January 26, 1918, and in the course of conversation between them plaintiff offered to sell his car to Smith. In the company of one Risser they went to Adam Conilio's garage and after inspection of the car plaintiff and Smith entered into an agreement for its purchase by Smith. The agreement was oral, and, as shown by the uncontradicted testimony of plaintiff, was to the effect that Smith agreed to purchase the car for $1,000. In testifying the plaintiff said:

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the consent or knowledge of plaintiff, took the car from the Adam Schillo garage and on February 19, 1918, placed it in the Keck garage at LaGrange. February 6, 1918, plaintiff directed Edwin W. Schillo, manager of the Schillo Motor Car Co., to notify his father, Adam Schillo, that the deal for the sale of the automobile was declared off, and not to deliver the automobile to Smith. Adam Schillo testified that he was not notified by his son of this fact until after Smith had taken the car. Shortly after plaintiff became apprised of the fact that Smith had taken the car he again met him at Chicago and demanded that he, Smith, return the car to the Schillo garage. Smith admitted he had taken the automobile without any right to do so, and promised to return it. Plaintiff immediately thereafter entered the military service of the United States at Washington. Plaintiff was notified by letter that defendant had levied on the automobile to satisfy the judgment against Smith and his wife, and April 30, 1918, five days after the sheriff's sale, he sent the telegram following to the defendant:

> "Understand you have sold Moline-Knight thinking it belonged to A. A. Smith. Youre absolutely wrong. I will hold you liable for all damages."

Benson, plaintiff's former partner, testified that Smith informed him by telephone of the contemplated sheriff's sale and that he in turn, before the sale, telephoned Mr. Kilgour, president of defendant bank, that the car was not the property of Mr. Smith, but was owned by plaintiff; that Mr. Kilgour informed the witness that the sale would go on and for the witness to see the bank's attorneys. Mr. Kilgour, however, denied any recollection of this telephone conversation.

There is no denial that Smith had no right at any time to possession of the automobile, which was the property of plaintiff. Smith's failure to make the payments as agreed by him and his delivery of a worthless check to plaintiff authorized

plaintiff to regard the contract as cancelled. But, even if Smith had made the first payment required by the contract, he would not have been vested thereby with any right to possession of the car; such right rested upon his making full payment as agreed upon. Certainly, after February 6, 1918, when Smith admitted his inability to pay for the car, and the calling off of the deal by plaintiff, it cannot be held that the relationship of vendor and vendee existed between him and plaintiff.

Several months before Smith removed the automobile from the garage the defendant bank extended credit to him and his wife, and it is not claimed that prior to the making of the levy the bank relied upon any act or promise of plaintiff, and it never at any time parted with anything of value as a result of Smith's possession of the car.

The owner of chattels may recover for a conversion thereof where it appears that the party in possession is not an innocent bona fide purchaser for value; a judgment creditor who, as in the present case, takes possession of property not the property of the judgment debtor cannot be said to be a bona fide purchaser for value, and we are inclined to the view that such judgment creditor's position with respect to property levied upon is the same as that of an attachment creditor - the judgment creditor's title to the property is no better than that of his judgment debtor. This is particularly so where, as in the present case, sufficient evidence is admitted to warrant a finding that the judgment creditor had notice of the owner's interest in the property before the sheriff's sale was had.

In the case of Corzine v. Brents, 123 Ill. App. 615, it is said:

plaintiff to regard the contract as cancelled. But, even if Smith had made the first payment required by the contract, he would not have been vested thereby with any right to possession of the car; such right rested upon his making full payment as agreed upon. Certainly, after February 8, 1916, when Smith admitted his inability to pay for the car, and the selling off of the deal by plaintiff, it cannot be held that the relationship of vendor and vendee existed between him and plaintiff.

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In the case of Dorwin v. Brecht, 132 Ill. . 615, it is said:

> "A judgment creditor does not stand in the position of an innocent purchaser, as he parts with nothing in exchange for the property, and does not take it in satisfaction of his debt. He takes no greater interest or better title in the property than his debtor. Schweizer v. Tracy, 76 Ill. 345; Berry v. W. D. Allen & Co., 59 Ill. App. 149; Nonotuck Silk Co., v. Levy, 75 Ill. App. 55."

In the case of Schweizer v. Tracy, 76 Ill. 345, it was held that where a person had purchased goods upon false and fraudulent representations and thereafter sells them to an innocent purchaser for value the latter would acquire a valid title thereto, and it was said in that case that

> "an attaching creditor stands in the light of a purchaser, not necessarily as against the world, but as against another purchaser, the creditor having, by virtue of his attachment, first obtained possession of the property; thus acknowledging the common doctrine respecting the sale of personal property, that a sale without the delivery of possession is void as against subsequent purchasers and creditors. * * * *
> But in the case before us, the attaching creditor has no such plain rule of law to invoke in his behalf. He can cite the doctrine that where personal property has been obtained by means of a fraudulent purchase, a bona fide purchaser thereof from the fraudulent vendee, for a valuable consideration, without notice, will acquire a good title, but that does not embrace the case of a mere attaching creditor."

It is attempted to draw a distinction in the application of the rule between the case of an attachment creditor and that of a levy by an execution judgment creditor. The Supreme court, however, in Schweizer v. Tracy, supra, relied expressly upon the case of Tousley v. Tousley, 5 Ohio St. 78, where it was held that "a judgment creditor is not a purchaser nor entitled to the privileges of that position."

In its opinion in the Schweizer case, supra, the Supreme court said:

> "The only difference, as affects the present question, between the lien of a judgment and one acquired by attachment, is that one is general and the other specific. We are unable to see that this distinction should change the rule in its application to a case like the present."

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"The only difference, as affects the present question, is that one is general and the other specific. A title under a judgment and one acquired by deed, between the lien of a judgment creditor and a purchaser, not to see that this distinction should change the rule in its application to a case like the present."

In the opinion in the Dunwiddie case, supra, the Supreme Court said:

"A judgment creditor is not a purchaser nor entitled to the privileges of that position."

This case of Townley v. Townley, 5 Ohio St. 78, where it was held that a judgment creditor is not a purchaser not entitled to the privileges of a lien of a judgment and one acquired by deed between the lien of a general and one acquired by deed as to a specific chattel, the creditor having, by virtue of his attachment, first obtained possession of the property; thus weakening the common doctrine recognizing the sale of personal property, that a sale without the delivery of possession is void as against subsequent purchasers and creditors. * * * * *

But in the case before us, the attaching creditor has no such plain rule of law to invoke in his behalf. He can cite the doctrine that where personal property has been obtained by means of a fraudulent purchase, a bona fide purchaser thereof from the fraudulent vendee, for a valuable consideration, without notice, will acquire a good title, but that does not surrace the case of a mere attaching creditor."

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right to the automobile was immediate, absolute and unconditional, and that it did not depend upon any act to be performed by him. He had never delivered possession of the property to Smith, and the taking of the automobile was wholly without the consent of its owner; hence, as a necessary result, the levy by the bank thereon did not and could not vest it with any right thereto.

It is said that plaintiff's alleged transactions with Smith having been in parole and unrecorded, the statutes give the garage keeper, Keck, a lien on the automobile and that as a consequence plaintiff was not entitled to an immediate or absolute right of possession thereof. There is nothing at all in this point. The uncontradicted evidence discloses that the taking of the car was wholly wrongful and unauthorized. It is urged, too, that the defendant was an execution creditor, that its judgment had become a lien, and that this fact distinguishes the instant case from the cases above cited. Reliance is had upon the case of Crancer Co. v. Williams, 191 Ill. App., 451, where it is said:

> "It has been frequently held in cases where an officer was sued either in an action of replevin or an action of trespass, that the execution was sufficient to protect him if the suit was by a party against whom he held the execution, but that when he levies upon the goods of a third person, a stranger to the execution, he must produce the judgment as well as the writ to justify the seizure."

In the Crancer Company case a conditional sale of a piano was made; the vendor, retaining title in himself, delivered the chattel to the vendee so as to clothe him with apparent ownership, and it was held that a bona fide purchaser thereof or his execution creditor was entitled to be protected as against a claim of the original vendor. As hereinbefore stated, the uncontradicted evidence in the case at bar shows that plaintiff had not delivered possession of the car to Smith, and that while an attempt had been made to sell the property to him, the attempt to do so failed, due

right to the automobile was immediate, absolute and unconditional, and that it did not depend upon any act to be performed by him. He had never delivered possession of the property to Smith, and the taking of the automobile was wholly without the consent of its owner; hence, as a necessary result, the levy by the bank thereon did not and could not vest it with any right thereto.

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> "It has been frequently held in cases where an officer was sued either in an action of replevin or an action of trespass, that the execution can sufficient to protect him if the suit was by a party against whom may be held the execution, but that when he justify the seizure."

In the Spencer Company case a mortgage on a stock of goods was made; the vendor, retaining title in himself, delivered the chattel to the vendee so as to clothe him with apparent ownership, and it was held that a bona fide purchaser thereof or his execution creditor was entitled to be protected as against the claim of the original vendor. As heretofore stated, the uncontradicted evidence in the case at bar shows that plaintiff had not delivered possession of the car to Smith, and that while on the car there had been

solely to the fact that Smith was unable or unwilling to comply with the terms of the agreement. Further than this, on February 6, 1918, Smith consented to a complete cancellation of the agreement. Here there was no vesting of the purchaser with indicia of ownership. If there had been, the cases cited would have been an authority in favor of defendant's contention. Nor does the evidence show that the plaintiff stood by, with knowledge of the levy, and permitted the sale to be made without protest. Indeed, so far as the evidence relates at all to this matter, it shows that plaintiff acted promptly in notifying defendant of his ownership of the automobile.

It is said that no showing was made by competent evidence of the market value of the automobile at the time it was levied upon by the sheriff. A witness, Keck, testifying for defendant, said the car was worth $500. Benson, a witness for plaintiff, testified that on April 4, 1918, the car was worth from $1000 to $1200.

The trial court improperly admitted evidence of the cost of the car at the time it was purchased in 1915. This error was not, however, so serious as to authorize a reversal of the judgment.

While objection is made to the action of the court in giving and modifying certain instructions, it is our opinion that no error was thereby committed which would warrant a reversal of the judgment.

The judgment of the County court is affirmed.

AFFIRMED.

McSurely, J., concurs.
Matchett, J., dissents.

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The trial court improperly admitted evidence of the cost of the car at the time it was purchased in 1918. This error was not, however, sufficient to authorize a reversal of the judgment.

While objection is made to the action of the court in giving and modifying certain instructions, it is our opinion that no error was thereby committed which would warrant a reversal of the judgment.

The judgment of the County Court is affirmed.

AFFIRMED.

Mosurely, J., concurs.
Matchett, J., dissents.

150 - 25921 MR. JUSTICE McSURELY SPECIALLY CONCURRING.

Defendant had notice before the sale that the automobile belonged to plaintiff, then in military service out of the State. It admits receipt of another such notice, written, from plaintiff before it received any money from the sale or satisfied its judgment against Smith. This takes the bona fides out of the sale.

MR. JUSTICE MATCHETT DISSENTING.

I dissent from the conclusion reached and from the law as stated in the opinion of the majority of the court. Upon the facts as stated in the opinion, with undisputed facts which appear in evidence, I think the plaintiff could not recover.

These additional facts are, first, that plaintiff never returned to Smith the check given in payment of the first instalment on the contract of sale; and, second, that Benson, who testified that he told one of the Bank's officials and its attorney prior to the sale that plaintiff, not Smith, owned the automobile in controversy, volunteered so to do, and did not assume to or actually have any authority from plaintiff to give any such notice. This is established to be a fact both by the testimony of Smith and Benson. There was, therefore, I think, no evidence from which the jury could properly find that the defendant had any notice prior to the sale of plaintiff's alleged rights, and notice five days after sheriff's sale xxxxxxxxxxxx was unavailing.

150 - 25921 MR. JUSTICE MOUNTNEY MOUNTFIELD CONCURRING.

Defendant had notice before the sale that the automobile belonged to plaintiff, then in military service out of the state. It admits receipt of another much notice, written, from plaintiff before it received any money from the sale or satisfied its judgment against Smith. This takes the point right out of the case.

MR. JUSTICE CATCHEM DISSENTING.

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These additional facts are, first, that plaintiff never returned to Smith the check given in payment of the first instalment on the contract of sale; and, second, that Benson, who testified that he told one of the Bank's officials and its attorney prior to the sale that plaintiff, not Smith, owned the automobile in controversy, volunteered no to do, so did not manage to or actually have any authority from plaintiff to give any such notice. This is established to be a fact both by the testimony of Smith and Benson. There was, therefore, I think, no evidence from which the jury could properly find that the defendant had notice five days after plaintiff's attorney wrote, and any notice prior to the sale of plaintiff's attorney writes, and plaintiff before it received any money from the sale or satisfied its judgment against Smith. This takes the point right out of the case.

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The uncontradicted evidence also shows that the automobile was delivered to Smith on plaintiff's order.

Adam Schillo, from whom Smith obtained the automobile, was subpoenaed as a witness for defendant, and testified with apparent reluctance:

> "The Moline Knight car was brought into my place of business that belonged to Mr. Drain. He told me he had sold this car to Mr. Smith. He told me to deliver possession of this car to Mr. Smith, and I delivered possession to Mr. Smith; that was the last I saw of this automobile. Mr. Drain told me to deliver it to Mr. Smith. After Drain told me this, my son told me over the 'phone not to deliver the car to Smith, At the time my son told me this the car was not in my possession. It was gone. Smith had taken it away."

The opinion of the majority relies on the proposition of law that a judgment creditor does not stand in the position of an innocent purchaser, as he parts with nothing in exchange for the property and does not take it in satisfaction of his debt; that he takes no greater interest or better title in the property than his debtor. That was evidently the theory of the trial court, and reliance is placed on the law as stated in Schweizer v. Tracy, 76 Ill. 345. It was held in that case that an attaching creditor does not stand in the same position as an innocent purchaser for value, as against the claim of a seller from whom the judgment debtor had obtained possession of the property by fraud. That was the precise question before the court, and that decision has, in that respect, been since uniformly followed in this State. But that a judgment creditor is in a different position is established by a long line of decisions in this State.

The precise question as to the rights of a judgment creditor was before the Supreme court of this State in the case of Van Duzor v. Allen, 90 Ill., 499. There the plaintiff vendor brought an action of replevin to recover a threshing machine which had been levied upon by judgment creditors of the vendee. The court there said:

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The precise question as to the rights of a judgment creditor was before the Supreme court of this State in the case of Van Duzer v. Allen, 90 Ill. 499. There the plaintiff vendor brought an action of replevin to recover a threshing machine which had been levied upon by the sheriff under executions of the vendee. The court there said:

"It clearly appears from the evidence that, as between appellant and Gaston, the trade was not so far executed as to pass the title of the property to the latter. As between them, appellant could no doubt have maintained replevin for its recovery. But the question is presented, whether or not there was such a sale and delivery as to render the property liable to levy and sale on execution against Gaston, whether or not there was such a sale and delivery as passed the title to the purchasers * * * without notice. * * *

A bona fide creditor, who under a judgment and execution acquires a lien on property thus situated, occupies the same position in all respects as does a bona fide purchaser. Where the apparent owner of property thus acquired had the indicia of ownership, and may sell and pass a good title to a purchaser without notice, a bona fide creditor may seize the property on execution and sell it thereunder, and pass the title, not only against the apparent but also the real owner. The creditor and purchaser stand on the same footing, and each will be equally protected."

Again applying the same principle in the case of Gilbert v. National Cash Register Co., 176 Ill. 288, the court said:

"In Illinois if a person agrees to sell to another a chattel on condition that the price should be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee, so as to clothe him with apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor.' Harkness v. Russell, 118 U. S. 678; Brundage v. Camp, 21 Ill., 329; McCormick v. Madden, 37 Ill. 370; Murch v. Wright, 46 Ill. 487; Mich. Central Ry. Co. v. Phillips, 60 Ill., 190; Lucas v. Campbell, 88 Ill. 447; Van Duzor v. Allen, 90 Ill. 499. * * *

In VanDuzor v. Allen, supra, we held that a bona fide creditor, who under a judgment and execution acquires a lien on property while in the actual possession of a vendee by delivery from the vendor, or taken and held by his consent, occupies the same position in all respects as does a bona fide purchaser from such vendee."

I think there is on principle a clear distinction between rights of an attaching creditor and a creditor levying on an execution issued on a valid judgment. The execution creditor by the satisfaction of his judgment gives value, while the attaching creditor has only a claim which has not as yet been reduced to judgment, and all his rights are derived from the Attachment Statute.

Moreover, I think that in this case plaintiff by his

"It clearly appears from the evidence that, as between appellant and Dayton, the trade was not so far executed as to pass the title of the property to the latter. As between them, appellant could no doubt have maintained replevin for the recovery. But the question is presented, whether or not there was such a sale and delivery as to reduce the property liable to levy as a sale on execution against Dayton, whether or not there was such a sale and delivery as passed the title to the purchasers x x x without notice. x x x

A bona fide creditor, who under a judgment and execution acquires a lien on property thus acquired and the immediate or ostensible, and may sell and pass a good title to a purchaser without notice, a bona fide creditor may retain the title, not only against the appellant but also the real owner. The creditor and purchaser stand on the same footing, and each will be equally protected."

Again applying the same principle in the case of

Gilbert v. National Cash Register Co., 178 Fed. 86, the court said:

"It follows that a person appears to sell to another a chattel on condition that a low price should be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee, so as to clothe him with apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor." Berkowss v. Vogel, 116 U. S. 696; Brundage v. Camp, 21 [illegible] 539; Gordon v. Bodden, 47 111. 370; Burns v. Fiske, 46 111. 467; Kerr, Chattel Ly. 2d. p. 147; Vail v. Edson, 90 111. 429. x x x

In Wheeler v. Iler, 129, Fed. 1, we held that a bona fide creditor, who under a judgment and execution acquires a lien on property while it is the actual possession of a vendee by delivery from the vendor, or taken and held by his consent, acquires the same rights as a bona fide purchaser from such vendee."

I think there is no principle clear distinction between rights of an attaching creditor and a creditor levying on an execution issued on a valid judgment. The execution creditor by the satisfaction of his judgment given value, while the attaching creditor has only a claim which is not yet been reduced to judgment, and all his rights are derived from the attachment statute.

Moreover, I think that in this case [illegible] by the

conduct waived any claim to this automobile as against the defendant. Plaintiff knew Smith had possession of the automobile. This was the middle of February. The sheriff's sale was had on April 25th. For about seventy days, therefore, knowing that Smith was clothed with the indicia of title, plaintiff made no further effort to reclaim his property. The only excuse he gives is that he told Smith to take the automobile back to the garage and thought he had done so. Smith betrays a like guileless confidence in plaintiff and allows him to keep the protested check, although the sale is supposed to have been rescinded.

I think on the plainest principles that plaintiff by his actions, as against defendant, must be held to have waived his right to rescind. I think this is the law even in those states which go so far as to hold that neither creditors nor purchasers can, under such circumstances, take any title other than that which the judgment debtor has. Latherby et al. v. Cummings, 54 N.J.L. 172; Smith v. Denny, 6 Pick. 262.

But even if it be conceded that there were issues of fact which should have been submitted to the jury, I think the instructions given and refused would require a reversal in this case, because, in effect, these took all questions of fact from the jury. Instruction No. 1 for the plaintiff told the jury:

> "The court instructs you that if you believe from a preponderance of the evidence in this case that A. J. Smith wrongfully obtained possession of the Moline Knight automobile in question, if he did, and held said automobile wrongfully and without authority from the plaintiff, when it was converted by the defendant, LaGrange State Bank (if it was so converted), then the defendant is not in the position of an innocent purchaser for value, and took no better title to said automobile than the said A. J. Smith had, if any, at the time of said conversion."

Again, in plaintiff's instruction No. 3:

April 16th. For about seventy days, therefore, insuring that Smith was clothed with the indicia of title, plaintiff made no further effort to reclaim his property. The only excuse he gives is that he told Smith to take the automobile back to the garage and thought he had done so. Smith testify a like inclination conflidence in plaintiff and allows him to buy and pressured stock, although the sale is sub coed to have been rescinded.

I think on the latest testimonies that plaintiff on his motions, a reasonable delivery, duty is held to have waived his right to rescind. I think this is the law even in close cases, under such circumstances, more any little other item that might the judgment under here. Twitchell et al. v. Commissioner, 24 N.J. 172; Smith v. Jersey, 9 Fed. 202.

But even if it be considered that a sale was made as a fact which should have been submitted to the jury, I think the - attempted plaintiff recovery in this case, possess, in effect, these took all questions of fact from the jury. Instruction No. 1 for the plaintiff told the jury:

> "If you find from the evidence in this case that the defendant, Barbara Plato Punk (if it was he contracted), without the consent from the plaintiff, did sell the motor vehicle in question, if he did, and Bill and Smith wrongfully obtained possession of the car from plaintiff and thereafter the defendant is not to the question of ... in good faith ... then the plaintiff ... and took no better title to ... than Smith had ... Smith ... it ... title ... owner, ... the ... and ... version."

"You are instructed as a matter of law, that all that need be shown in an action in trover for the conversion of personal property is the ownership of the property in the plaintiff; that it came into possession of the defendant, and that defendant converted it to his own use."

These instructions, it is apparent, wholly ignore the defense presented in the case and plaintiff's theory of it.

I think the court also erred when by the tenth instruction, at the request of plaintiff, it told the jury, as matter of law:

"that if under the evidence and the instruction of the court you find the defendant guilty, then the measure of the plaintiff's damages will be the retail market value of the property at the time of the conversion, and 5% interest thereon, since that date, but not to exceed the sum of $1,000.00."

Not only does this instruction state an incorrect rule of law as to the measure of damages, but I think it was clearly erroneous for the court by this instruction to intimate to the jury that $1,000.00 might be allowed.

I think, also, defendant's third requested instruction should have been given and that it was error to refuse it. It is as follows:

"The court instructs the jury as a matter of law, that where one of two innocent persons must suffer as a result of the wrong committed by a third person, the loss must fall upon the one of the two parties who, by his acts or conduct, put it within the power of the third party to cause the loss."

This proposition was not covered by any other instruction, and assuming that there were issues of fact in the case, defendant was entitled to have the jury so instructed.

I think the judgment should be reversed and the cause remanded for another trial.

"You are instructed as a matter of law, that all that need be shown in an action in trover for the conversion of personal property is the ownership of the property in the plaintiff; that it came into possession of the defendant, and that defendant converted it to his own use."

These instructions, it is apparent, wholly ignore the defense presented in the case and Plaintiff's theory of it.

I think the court also erred when by the tenth instruction, at the request of plaintiff, it told the jury, as matter of law:

"that if under the evidence and the instruction of the court you find the defendant guilty, then the measure of the plaintiff's damages will be the reasonable market value of the property at the time of the conversion, and 6% interest thereon, since that date, but not to exceed the sum of $3,000.00."

For only once this instruction omits an incorrect rule of law as to the measure of damages, but I think it was clearly erroneous for the court by this instruction to instruct the jury that $3,000.00 might be allowed.

I third, also, defendant's third requested instruction should have been given and that I was error to refuse it. It is as follows:

"The court instruct the jury as a matter of law, that where one of two innocent persons must suffer as a result of the wrong committed by a third person, the loss must fall upon the one of the two parties who, by his acts or conduct, put it within the power of the third party to cause the loss."

This proposition was not covered by any other instruction, and assuming that there was cause for it for the case, defendant was entitled to have the jury so instructed.

I think the judgment should be reversed and the cause remanded for another trial.

254 - 26026

ARTHUR R. WOLFE,
Appellant,

vs.

CHICAGO CITY RAILWAY CO.,
et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

225 I.A. 631

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE C URT.

Plaintiff brought suit in the Superior court of Cook County to recover damages for injuries which plaintiff's declaration charges were caused by the negligence of servants of defendants in the operation of a street car. The accident occurred at the corner of west Adams and LaSalle streets, Chicago, at about six o'clock on the evening of March 11, 1916.

Evidence offered for plaintiff tends to prove that he intended and attempted to board a street car west bound on Adams street; that as the car approached LaSalle street plaintiff waved his hand as a signal for the car to stop; that the car stopped or slowed down to a slow speed and plaintiff took hold of a center upright on its rear platform and placed one foot on the car step; that while he was in this position the car gave a sudden jerk and proceeded westward across LaSalle street; that he thereby lost his hold of the center upright and was thrown off his balance; that he seized a rear rod on the platform of the car and was swung around to the rear of the platform; that he was dragged by the movement of the car a distance of about 40 feet before being thrown to the pavement; that as a result of the fall he sustained a skull fracture.

The case was tried before a jury, which returned a verdict in favor of defendants and a judgment was entered thereon

ARTHUR R. WARE,

Appellant,

vs.

CHICAGO CITY RAILWAY CO.,

Appellee.

Appellant's Brief and Abstract of Record.

Appeal from Superior Court.

Mr. Justice Adams

delivered the opinion of the Court.

Plaintiff brought suit in the Superior Court of Cook County to recover damages for injuries which plaintiff's declaration charges were caused by the negligence of defendant in the operation of a street car. The evidence occasioned at the trial of said cause and jury in attendance, Dis-cago, at about six o'clock on the evening of March 11, 1910.

Testimony offered for plaintiff tends to prove that he intended and attempted to board a street car which was about to Adams street; that as the car (which was) nearly stopped plaintiff swung his right leg over the car step; that as he did so, that the car started with a sudden jerk or motion to the right, throwing him violently to the ground, by reason of which he received a fracture of the right leg between the knee and ankle; that he was taken into the car by persons standing on the platform; that he was carried to a physician's office in the building on the corner of Adams and Dearborn streets; that he was confined to his bed for about six weeks; that by reason of said injuries he has been unable to attend to his business; that he has suffered great pain; that his leg is shorter than the other; that he has been put to great expense for medical attendance, and that he is still lame.

Defendant's testimony tends to show that the car was not in motion when plaintiff attempted to get on it; that he attempted to get on while the car was in motion; that he fell and received the injuries complained of by reason of his own negligence in attempting to get on the car while in motion.

Plaintiff's counsel in his opening statement to the jury stated that plaintiff would prove that he was a passenger on the car and was injured by reason of the sudden starting of the car while he was getting on the platform, and that he would prove that he was in the employ of the Chicago Telephone Company as a lineman, and that by reason of his injuries he was unable to work at his trade, and that he would prove that he had been damaged in the sum of $5,000.

Plaintiff's counsel in his opening statement to the jury stated that plaintiff would prove that he was a passenger on the car and was injured by reason of the sudden starting of the car while he was getting on the platform, and that he would prove that he was in the employ of the Chicago Telephone Company as a lineman, and that by reason of his injuries he was unable to work at his trade, and that he would prove that he had been damaged in the sum of $5,000.

which the plaintiff seeks to reverse by his appeal to this court. Plaintiff insists that the verdict is contrary to the weight of the evidence; that the court improperly instructed the jury and that error was committed in admitting certain evidence offered by defendant and in refusing to admit evidence offered by plaintiff.

Plaintiff and one of his witnesses testified that just before the accident happened the car stopped at the usual stopping place east of LaSalle street. A witness for plaintiff, Evans, testified that he was uncertain whether the car came to a stop or whether it slowed down. Other witnesses stated that the car slowed down just before it reached the crossing. The motorman testified, "I figured on stopping on this side of the crossing unless I had the signal from the officer to go ahead." A police officer detailed at the intersection of LaSalle and Adams street testified that he had given a signal for the moving of the north and south traffic on LaSalle street before the streetcar reached the stopping point east of LaSalle street, and that while the car was east of the crosswalk he gave the signal for the movement of east and west traffic.

There is a direct contradiction in the evidence between several of the witnesses as to whether the plaintiff was standing on the street waiting for the car to approach, or whether, as testified by Kuhn, plaintiff's witness, he ran toward the car and attempted to board it. On this point Kuhn testified as follows:

"Q. Well, you saw him, didn't you?
A. All I seen him was cutting across on a slant.
Q. Running? A. Yes, sir.
Q. Did he run until he got up to the end of the car?
A. He did."

One Kenney, a witness for defendant, said:

the Kennedy, a witness for defendant, were:

Q. Did he and Smith go up to the end of the car?
A. He did.
Q. Was Smith with him?
A. Yes, sir.
Q. Will I been die are writing because an a client.
A. Smith had.
"Q. Only, Jon was him, Frank Jon."

attempted to word it. On this point the record is confused; plaintiff's attorney, he ran toward the car and stepped on the street waiting for the streetcar, or whether, as recalled by John, plaintiff's witness, he ran to the car and taken notarnal of the witnesses as to whether the plaintiff was

There is a sharp contradiction in the evidence pertaining to where the motorman was when the car started. Plaintiff and one of his witnesses testified that the car was sent on its journey to take the signal for the movement of cars not west Trail.

Defendant and in refusing to admit evidence offered by plaintiff that error was committed in admitting certain evidence offered by the evidence; that the court improperly instructed the jury and plaintiff insists that the verdict is contrary to the weight of which the plaintiff seeks to reverse by his appeal to this court.

stopping place east of Dahlia street. A witness for plaintiff, Evans, testified that he was uncertain whether the car came to a stop or whether it slowed down. Other witnesses showed that the car slowed down just before it resumed the traveling. The motorman testified, "I figured on stopping on this side of the crossing anyway, I had the signal from the officer to go ahead." A police officer detailed at the intersection of Dahlia and Adams street testified that he had given a signal for the waving of the motorman and rough traffic on Dahlia street before the streetcar reached the stopping point west of Dahlia street. He then opened the door and in so doing struck plaintiff on the arm, knocking him off the car, and that while the car was sent of the crossmark to take the signal for the move-

> "As it" (the streetcar) "got more towards the building line of LaSalle street, I was between the north track and the curb of the north walk. I noticed a man run out from the sidewalk and grab the car. He was in the act of trying to get a handhold when he slipped and fell from the car behind it. When this man ran out and tried to board the car it was picking up speed to make the crossing at LaSalle street."

The testimony of the motorman and conductor is to the effect that no one was waiting near the street intersection to board the car. A witness, Evans, said:

> "The first thing I noticed was that he had hold of that rail. He was on the step of the car finally. When he got on the step of the car he was maybe 15 or 20 feet from the walk. The car had then increased considerably in speed."

The evidence introduced on the trial both on behalf of the defendant and the plaintiff is of such character that we are unable to hold that the verdict of the jury was manifestly against the weight of the evidence. There is evidence in the record which supports the contention that plaintiff ran from the sidewalk and attempted to board the car while it was in motion and increasing its speed as it approached the intersection.

At the request of defendant the court gave the jury an instruction, No. 14, as follows:

> "If you believe from the evidence, under the instructions of the court, that the defendant had no notice, or in the exercise of ordinary care could not have known that the plaintiff intended to board the said car, at the time and place in question, and if you believe from the evidence that he was injured in an attempt to board the car under such circumstances, your verdict must be in favor of the defendants."

It is argued that defendants were required to exercise the highest degree of care to discover plaintiff's intention to board the car. The instruction, when considered in connection with the facts of the case, was not objectionable. It directed a verdict in favor of defendants if the jury believed from the evidence that defendants had no notice, or in the exercise of ordinary care could not have known, that plaintiff intended to board the car. Plaintiff's theory is that he was standing waiting for the car to approach; that he signaled to the motorman and that as the car

approach; that he signaled to the motorman that he was to
Pleasantville's there. It was he was waiting for the car to
came could not have known, that plaintiff intended to board the car.
dence that defendant or his motorman, or in the exercise of ordinary
vented in any of these ways it is the jury should find from the evi-
with the fact. The jury, not the judge, must consider and determine
to board the car. The jury, not the judge, must determine whether
ules the relative value of each piece of testimony, and whether
It is within the province of the jury to weigh the testimony,
summoned, -- are the sole judges of facts, and not under any cir-
me was injured as to charge to court, and not under any
place in question, and if you do find from the evidence that
the exercise of ordinary care would not have known that the
plaintiff intended to board the car, at the time and
tions of the court, there was no duty resting upon the motor, or in

"If you believe from the evidence, under the instruc-
an instruction, no. 14, as follows:

The defendant requested the court to give the jury
and increasing its speed as it was nearing the intersection.

It was a question of fact for the jury to determine from the
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caused which caused the motorman to believe that plaintiff was from the
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the opinion that no one was waiting near the street intersection

The testimony of the motorman and conductor is to
the effect that they saw it was plaintiff's intention to board
the car. When this man ran out and tried
to board the car it was plaintiff's speed to make the crossing at Reynolds street."

"As it (the streetcar) got more toward the
building line of Reynolds street, I was between the north
track and the curb of the north walk. I noticed a man
ran out from the sidewalk and grab the car. He was in the
act of trying to get a hand in when he slipped and fell
from the car behind it. When this man ran out and tried

slowed down or stopped at LaSalle street he attempted to board it. Much of the evidence, however, tends to establish the fact that plaintiff, without notice of any sort to the persons in charge of the car, ran from the sidewalk and attempted to board the car while it was in motion and its speed accelerating. Under the evidence the jury could properly conclude that defendants had no notice, and in the exercise of ordinary care could not have received knowledge of plaintiff's intention to board the car. The law does not require persons in charge of the operation of a streetcar operated in the heart of a crowded city, to exercise the highest degree of care to discover the intent of persons standing or passing near or about the car on the streets and sidewalks.

The evidence shows that the plaintiff did in fact attempt to board the car and whether his conduct was such as would establish the relation from that time of passenger and carrier between the parties is a much disputed question. But however this may be, it cannot be held that such relation existed before plaintiff made the attempt to board the car; that could be shown only by proof of an express or implied invitation on the part of defendant to plaintiff to board the car and an express or implied acceptance thereof by plaintiff. The jury had sufficient evidence before it to warrant a finding that defendants did not intend or attempt to stop the car east of LaSalle street to take on and let off passengers, and even if it be conceded that plaintiff's testimony that he was standing in the street waiting for the approaching car and that he gave a signal to the motorman of his intention to board it, be true, this fact in and of itself did not make him a passenger on the car. This relationship could not be imposed upon defendants without their implied or express consent. If the evidence offered for de-

implied or express consent. If the evidence offered for relationship could not be imposed upon defendants with an choice in and of itself did not make him a passenger on the car. This is the motorman of his invitation to board it, be true, this fact alone left waiting for the approaching car and that he was a mutual caused that plaintiff's testimony that he was standing in the alone, can form the sidewalk and attempted to board the car the car, and by stopping of motion of his speed accelerating. Under the plaintiff, without notice of any sort to the persons in charge of much of the evidence, however, tends to establish the fact that stopped or stopping at Lemaire street in attempted to board it.

standing or passing near or about the car on the streets and the highest degree of care to discover the intent of persons street-car operated in the heart of a crowded city, to exercise The law does not require persons in charge of the operation of a received knowledge of plaintiff's intention to board the car. no notice, and in the exercise of ordinary care could not have evidence the jury could properly conclude that defendants had while it was in motion and its speed accelerating. Under the

The evidence shows that the plaintiff did in fact

would separate the relation from that time of passenger and attempt to board the car and another like conduct was such as carrier between the parties in a much disputed question. But however this may be, it cannot be held that such relation existed before plaintiff made the attempt to board the car; that can be shown only by proof of an express or implied invitation on the part of defendant to plaintiff to board the car and an express or implied acceptance thereof by plaintiff. The jury had sufficient evidence before it to warrant a finding that defendants did not intend or attempt to stop the car short of Lemaire street to take on and let off passengers, and even if it be conceded that plaintiff's testimony that he was standing in the

fendants is true, then no act was performed by the persons in charge of the car which authorized plaintiff to believe that defendants were ready and willing to accept him as a passenger; he in no sense placed himself in charge of defendants, nor, before he attempted to board the car, did he occupy a place in any manner under defendants' control.

In C. & E. I. R. R. Co. v. Jennings, 190 Ill., 478, the Supreme court said:

> "Although it is not necessary that fare should have been paid or an express contract made, it is necessary that a person should be under the control of a carrier in order to be entitled to its care as a passenger. (2 Wood on Railway Law, 1037.) He must be at some place under the control of the carrier and provided for passengers so that it may exercise the high degree of care exacted from it; and the mere fact that an intending passenger has a ticket and intends to take a train does not create the relation of carrier and passenger."

In C. U. T. Co. v. O'Brien, 219 Ill., 303, the Supreme court said:

> "The relation of passenger and carrier is contractual and does not arise out of the fact that a person runs toward a moving car to get on board, but the relation may be proved by circumstances."

Reversible error was not committed by the court in giving this instruction, or in giving instructions Nos. 17 and 10. Instruction No. 17 is in part substantially similar to instruction No. 14. Nor do we believe the court committed reversible error in its rulings upon the admissibility of evidence.

Impeaching questions were asked witnesses Halverson and Johnson for the purpose of impeaching certain testimony given by the policeman, Ernes, who testified for plaintiff. Ernes' testimony in the main is to the effect that after he gave the signal for the east and west traffic he saw a man hanging onto the back of the west bound streetcar; that he was dragged about 12 or 15 feet; that he then let go and fell on his back in the car tracks. He testified also that he did not tell an attendant at a hospital that plaintiff tried to board a moving car and fell

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In C. & S. R. R. Co. v. Jennings, 100 Ill., 478 the Supreme court said:

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In C. R. C. Co. v. Byrne, 218 Ill., 303, the Supreme court said:

> "The relation of passenger and carrier is contractual and does not arise out of the fact that a person runs toward a moving car to get on board, nor the relation may be proved by circumstances."

[illegible] was not counteracted by the fact in [illegible] this instruction, or in giving instructions Nos. 17 and 18. Instruction No. 17 is in part substantially similar to instruction No. 14. Nor do we believe the jury considered reversible error in the giving upon the question of variance.

Impeaching [illegible] was made upon statements relative and Johnson for the purpose of impeaching certain testimony given by the policeman, Byrne, who testified for plaintiff. Byrne's testimony in the main is to the effect that after he drove the signal for the cars and went [illegible] he saw a man running into the back of the west bound [illegible] that he was dragged about 12 or 15 feet, that he then let go and fell on his back in the car tracks. He testified also that he did not fall in attempt at a boarding that plaintiff tried to board a moving car and fell

off on the crosswalk, and further that he did not tell officers Halverson and Johnson that "that is the way the accident happened, right there at the place of the accident." The impeaching questions put to Johnson and Halverson substantially follow and indicate this testimony of the policeman. Technically, the impeaching witnesses' attention should have been directed to the time and place where the alleged conversation took place, but the objection to the questions was that no foundation had been laid therefor.

Complaint is made of other rulings of the trial court on the admissibility of evidence as to which it is our opinion no reversible error was committed.

The judgment of the Superior court is affirmed.

AFFIRMED.

McCurely and Matchett, JJ., concur.

off on the crossmark, and further that he did not tell officers Halverson and Johnson that "that is the way the accident happened, right there at the place of the accident." The impeaching questions put to Johnson and Halverson substantially follow and implicate this testimony of the policeman. Technically, the impeaching witnesses' attention should have been directed to the time and place where the alleged conversation took place, but the objection to the question was that no foundation had been laid therefor.

Complaint is made of other rulings of the trial court on the admissibility of evidence as to which it is our opinion no reversible error was committed.

The judgment of the Superior court is affirmed.

AFFIRMED.

McMurray and Nutcher, JJ., concur.

16 - 26175

H. M. STEPHENS,
Defendant in Error,

vs.

WABASH RAILWAY COMPANY,
Plaintiff in Error.

ERROR TO
COUNTY COURT,
COOK COUNTY.

223 I.A. 631

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the County Court to recover the value of 393 crates of cantaloupes which he shipped on July 17, 1916, from Blevins, Arkansas, via the Prescott & Northwestern Railroad, to F. E. Nellis & Co., Chicago, Illinois. The shipment reached Chicago July 21, 1916, over the rails of defendant company.

The declaration charges in two counts that the defendant as a common carrier had agreed to safely transport and deliver the property to plaintiff at Chicago, and that as warehouseman at Chicago it had promised on the 21st day of July, 1916, to safely store the property. The defendant filed a plea of the general issue to the first count with notice of a defense of res adjudicata. In a plea to the second count defendant raised a question as to the jurisdiction of the trial court to determine "the effect of the carrier's tariff as to the icing of shipments without previous action by the Interstate Commerce Commission." Judgment was entered in the trial court in favor of plaintiff in the sum of $290.20, which the defendant seeks to reverse by appeal to this court.

Notwithstanding the fact that the briefs filed for defendant present several interesting and difficult

R. K. STRINGER,

Defendant in Error,

vs.

CANADA RAILWAY COMPANY,

Plaintiff in Error.

COCK COUNTY.

COUNTY COURT.

ERROR TO

MR. PRESIDING JUSTICE DUNN

DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered suit in the County Court to recover the value of 385 crates of cantaloupes which he shipped on July 17, 1910, from Blevins, Arkansas, via the Frisco & Northwestern railroad, to R. ". Wolfe & Co., Chicago, Illinois. The shipment reached Chicago July 27, 1910, over the rails of defendant company.

The declaration charges in two counts that the defendant as a common carrier had agreed to safely transport and deliver the property to Plaintiff at Chicago, and that we warehousemen at Chicago it had promised on the 31st day of July, 1910, to safely store the property. The delivered filed a plea of the general issue to the first count with notice of a defense of res judicata. In a plea to the second count defendant raised a question as to the jurisdiction of the trial court to determine "the effect of the order's entered on to the issue of rehearing without hearing evidence by the interstate commerce commission." Judgment was entered in the trial court in favor of plaintiff in the sum of $300.36, which the defendant seeks to reverse by appeal I to this court.

Notwithstanding the fact that the plaintiff filed for defendants personal services including one Phillips

questions we have not been aided by the filing of briefs on behalf of plaintiff.

It is urged that the trial court erred in refusing to grant a continuance of the cause on motion of defendant; that error was committed in a ruling on the admissibility of evidence offered in proof of a plea which it is said sufficiently alleges a former adjudication of a question of fact in controversy in the present suit, and, also that errors were committed in rulings on the admissibility of evidence tendered in proof of other facts in issue in the case. We express no opinion as to the validity of the position taken by counsel for defendant as to certain of these questions for the reasons; first, that as the judgment is to be reversed and remanded for a new trial certain of these questions may not again arise and, second, we hesitate to determine other questions presented with the aid, only, of ex parte argument.

The plaintiff seems to have rested his case in the trial court upon the charge that the defendant as warehouseman had failed to keep the car iced while it remained on a team-track in Chicago in violation of a tariff of the initial carrier. A traffic manager for F. M. Wellis & Co., testified that he found the melons in the car on its arrival in good condition and that five days thereafter he found the car short of ice, the melons ripening, and he requested to have the same iced as required by the tariff which was not done, resulting in the loss of a large proportion of the melons.

The plaintiff sought to prove a filing of the tariff with the Interstate Commerce Commission, under which it was claimed in the trial court that defendant was chargeable as warehouseman with the proper protection and care of the perishable goods while they remained in the car on defendant's

questions we have not been aided by the filing of briefs on behalf of plaintiff.

It is urged that the trial court erred in refusing to grant a continuance of the cause on motion of defendant; that error was committed in a ruling on the admissibility of evidence offered in proof of a plea which it is said sufficiently alleges a former adjudication of a question of fact in controversy in the present suit, and, also that errors were committed in rulings on the admissibility of evidence tendered in proof of other facts in issue in the case. We express no opinion as to the validity of the position taken by counsel for defendant as to certain of these questions for the reasons; first, that as the judgment is to be reversed and remanded for a new trial certain of these questions may not again arise and, second, we hesitate to determine other questions presented with the aid, only, of *ex parte* argument.

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The plaintiff sought to prove a filing of the tariff with the Interstate Commerce Commission, under which it was claimed in the trial court that defendant was chargeable as warehouseman with the proper protection and care of the perishable goods while they remained in the car on defendant's

track, by the testimony of one Prebost, Manager for F. B. Nellis & Co., consignee named in the bill of lading.

It is our opinion that the tariff should have been shown by the production of a copy thereof, certified to by a proper officer of the Interstate Commerce Commission. By section 7905, par. 12, Barnes Federal Code, 1919, (U. S. Statutes) tariff schedules are made matters of public record, certified copies of which are to be received in evidence with like effect as the originals. It was, also, error to permit oral proof of market reports of the United States Department of Agriculture; these reports seem to be matters of public record and could be shown in evidence only by the production of certified copies.

In the case of Mutual Orange Distributors v. The A. T. & S. Fe Ry. Co., general No. 25516, this court held that the exclusion of evidence tending to prove a custom under which a consignee was required to protect goods after their arrival at the place of destination and while upon the tracks of a terminal carrier, was error, and that "it was proper for defendant to show that as a matter of custom it had never performed any such service for the plaintiff or other shippers."

We think the trial court should have admitted offered evidence which tended to show that by a general custom the duty of protecting the goods was imposed upon plaintiff, and, also, excluded evidence offered by the defendant was admissible to prove that by a course of dealings between defendant and the consignee the latter had assumed the duty of protecting shipments of perishable goods while on the terminal carrier's team-track at Chicago.

The judgment of the County Court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

BRANDSTON VAN KLEECK D.

and the cause remanded to that court for a new trial.

The judgment of the Circuit Court will be reversed

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In the case of Mutual Clothe Distributors v. The

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Reilly & Co., consignee named in the bill of lading.

tiary, by the testimony of one Dropout, Member for P. S.

69 - 26717

EDWARD M. MILLER, Administrator of the estate of Walter Linder, deceased,
Plaintiff in Error,

vs.

WALKER D. HINES, as Director General of Railroads, operating Chicago Burlington & Quincy Railroad Company, a corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

223 I.A. 631[3]

MR. PRESIDING JUSTICE DWYER DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks by writ of error to reverse a judgment entered in the Superior Court of Cook County in favor of the defendant.

The third count of the declaration filed by plaintiff alleged that defendant was in possession and control of certain railroad tracks and right-of-way running in an easterly and westerly direction through the Village of La Grange; that said tracks were intersected and crossed in said village by a public highway, Fifth avenue, which ran in a northerly and southerly direction; that on February 1, 1919, the defendant operated a certain engine and train of cars in an easterly direction upon its tracks at the said intersection; that defendant operated gates at the intersection and that it was its custom to lower the same when trains were approaching the crossing for the purpose of preventing persons from crossing over the intersection; that this custom was known and relied upon by the public, including plaintiff's intestate; that at the time and place in question the defendant by its servants carelessly and negligently operated the engine and train of cars across and over the crossing "without lowering said gates, contrary to the custom aforesaid."

JEDIAH K. MILNER, Registrator
of the estate of Walter Fisher,
deceased,

Plaintiff in Error,

vs.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, a corporation,

Defendant in Error.

Error to
CIRCUIT COURT,
CLARK COUNTY.

HON. PRESIDING JUSTICE DUNN

DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks by writ of error to reverse a judgment entered in the Superior Court of Cook County in favor of the defendant.

The third count of the declaration filed by plaintiff alleged that defendants were in possession and control of certain railroad tracks and right-of-way running in an easterly and westerly direction through the village of Grandon; that said tracks were insecurely and carelessly laid in a dangerous and unworkmanlike manner, which was in a negligent and unskillful manner by a public highway, which was, at the time of the grading thereof, and ever since, a dangerous place for persons to travel upon; that on January 1, 1910, the defendants constructed a certain embankment and trestle of earth in an unskillful direction upon its tracks at the said intersection; that defendant changed the same when trains were obliged to stop for the purpose of discharging baggage from coaches over the intersection; that this action was known and relied upon by the public, knowing plaintiff's intestate; that at the time and place in question the engineer in charge of said train, carelessly and negligently observed the engine and train of cars coming and

A fourth count of the declaration charged that the defendant maintained at the crossing a certain bell; that it was its custom to ring the bell to notify persons of the approach of trains; that it "negligently propelled, operated and maintained said engine and train of cars toward, upon, across and over said railroad crossing, without ringing said bell, and contrary to the custom aforesaid."

The evidence introduced on the trial shows that at the time and place of the accident the defendant maintained in the Village of La Grange three tracks upon its right-of-way, which tracks extended in an easterly and westerly direction; that the tracks were crossed at grade by Fifth avenue, a public street, which runs in a northerly and southerly direction; that defendant maintained gates on the north and south sides of its right-of-way which were operated by lever by a towerman; that defendant also maintained, near the intersection, a bell, which it customarily rang to warn persons of approaching trains.

Plaintiff's intestate's death was caused by a collision between a taxicab in which he was riding and a train passing at a high rate of speed in an easterly direction over the southermost of the three tracks on defendant's right of way. The accident happened about 7:40 o'clock on the evening of February 1, 1919. The evidence shows that just before the accident occurred the taxicab driver had been employed to transport three persons to Riverside; that plaintiff's intestate, a boy of about the age of 16, volunteered to show the driver of the cab the route to the passengers' destination. Deceased got into the cab and sat on the right side of the front seat. The cab started from the railroad station, which was situated west of Fifth avenue, moved east a short distance and then turned south on Fifth avenue and was in the act of crossing the railroad tracks when it ran into

A fourth count of the declaration charged that the defendant maintained at the crossing a certain pit; that it was its duty common to ring the bell to notify persons of the approach of trains; that it "negligently improperly, operated and maintained said engine and train of cars toward. When, across and over said station aforesaid."

The evidence introduced on the trial shows that at the time and place of the accident the defendant maintained in the railroad crossing, without ringing said bell, and contrary to the duty of the defendant at the time aforesaid, a pit, which it customarily used to warn persons of approaching trains.

Plaintiff's intestate's death was caused by a collision between a train on which he was riding and a train passing at a high rate of speed in the westerly direction over the southeast of the three tracks on defendant's right of way. The accident happened about 7:40 o'clock on the evening of February 1, 1919. The evidence shows that, just before the accident occurred the deceased drove his team attempted to cross the railroad tracks in Riverside; that plaintiff's intestate, a boy of about the age of 16, undertook to open the gate at the end the tracks to the Beaumont, destination. He passed his into the car and out on the right side of the front seat. The car started from the railroad crossing, which was situated west of Fifth avenue, moved at the rate of one mile per hour and when it was about three and one half feet from the first track the train struck the car, throwing the deceased out and killing him instantly.

the second or third car of the passing train. Several witnesses testified that at the time the taxicab entered on defendant's right-of-way the gates were up and that no bell was ringing. This testimony finds some corroboration in testimony offered by the defendant. The speed of the taxicab as it crossed the tracks was variously estimated by the witness at from 8 to 15 miles an hour, and it is not denied that the train at the time of the collision was moving at a high rate of speed. There is a direct conflict in the evidence as to whether the gates were down at the time the taxicab passed on to the right-of-way. One witness for defendant testified that the cab was driven through the gates after they were lowered and the evidence shows that one arm of the gates was found, immediately after the accident happened, to be shattered and broken.

Plaintiff, however, is not requesting this court to reverse the judgment on the ground that the evidence heard upon the trial preponderates in favor of plaintiff. The only reason assigned for a reversal is that the court erred in giving certain instructions to the jury at the request of the defendant. The court at the request of defendant gave the jury the following instruction:

> "The jury are instructed that railroads are engaged in the performance of a business of a quasi public nature, and in carrying out the purpose for which they are created, must necessarily often operate their trains at such a rate of speed that they cannot be brought to a sudden stop without endangering the lives and safety of those riding therein. They travel on fixed tracks and it is the duty of anyone entering upon a crossing of a public highway and the railroad tracks to use care and caution to ascertain that a train is not approaching the crossing, or if one is approaching and about to pass over the crossing to wait until the train has passed before it can be passed over."

The evidence in the case shows that the plaintiff's intestate was a boy about 16 years of age. Some question is made in the briefs of counsel as to whether he was a passenger in the taxicab at the time of the accident. Whether he was a passenger

the second or third car of the passing train. Several witnesses testified that at the time the taxicab entered on defendant's right-of-way the gates were in such position that no train could approach the crossing. This testimony though some corroboration in testimony offered by the defendant. The speed of the taxicab as it crossed the tracks was variously estimated by the witness at from 3 to 15 miles an hour, and it is not denied that the train at the time of the collision was moving at a high rate of speed. There is a direct conflict in the evidence as to whether the gates were down at the time the taxicab passed on to the right-of-way. One witness for defendant testified that the cab was driven through the gates after they were lowered and the evidence shows that one arm of the gates was lowered immediately after the accident happened, to be shattered and broken.

Plaintiff, however, is not restricted this court to the jury's determination of the conflict in the evidence touching the failure of the gates to be lowered at the time of the accident. Whether no man a passenger in the midst of dangers so whether he was a passenger in the interstate man a boy about 10 years of age. Some question is made that the train was passing over the crossing, or if one is about a train is not sufficient the crossing the gates were down and the train was approaching and the railroad tracks in use each and caution to maintain of rubbish entering upon a crossing of a public highway and therein. They travel on fixed tracks and it is the duty although undoubtedly the lives and safety of those riding of speed that they cannot be brought to a sudden stop and in exercising due the purpose for which they are created. in the performance of a function of a quasi public nature, manifest for a reversal is that the court erred in giving certain the trial proposition in favor of plaintiff. The only reason reverse the judgment on the ground that the evidence heard upon

"The jury are instructed that reference are suggest

instruction:

court at the request of defendant gave the jury the following instructions to the jury at the request of the defendant. The

or merely a guest of the driver of the cab does not, in view of what seems to be the conceded facts of the case, appear to be material. The fact is, whatever his status with relation to the operation of the cab, he had no control thereof and had no power to interfere with the manner of its operation.

It is insisted that deceased's knowledge of the danger required some positive action upon his part, and that had the evidence shown his failure to act in some reasonable manner to prevent the accident, then his conduct would amount to contributory negligence. Reliance is had upon the case of Opp v. Pryor, 294 Ill., 547.

> "It was essential for the plaintiff to prove that she was in the exercise of ordinary care for her own safety in approaching and going upon the crossing, and she was not relieved from that duty because she was riding in an automobile. If she exercised such care any negligence of Ethel Shambaugh could not be imputed to her, but she would be responsible for her own negligence. The plaintiff sat at the right of the driver in front, with at least equal opportunity to observe danger and the approach of the train, and being bound to prove the exercise of ordinary care by herself, it was no less her duty than that of the driver to observe and avoid danger, if practicable and to warn the driver. (Flynn v. Chicago City Ry. Co., 250 Ill., 460; Pienta v. Chicago City Ry. Co., 254 Id., 346.) The plaintiff testified that she had no remembrance of the occurrence, and her only reliance to prove her ordinary care was the testimony of Ethel Shambaugh and Belle Wood as to what they could see."

Accepting this decision as an adequate expression of the law applicable to the conduct and care required of one, not in control of, but, riding in an automobile at the time of a collision, the language of the opinion does not authorize the giving of the instruction complained of. The instruction tells the jury that anyone entering upon a railroad crossing is required to use care and caution to ascertain that a train is not approaching, or if one is approaching and about to pass over the crossing, any such person is required to wait until the train has passed. Much valid criticism might be made of the instruction. It may be somewhat hypercritical to say that the instruction should have required the

or safety ; [illegible] of the driver of the cab does not, in view of what seems to be the conceded facts of the case, appear to be material. The fact is, whatever his status with relation to the operation of the cab, he had no control thereof and had no power to interfere with the manner of its operation.

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Accepting this decision as an adequate exposition of the law applicable to the subject [illegible], not in control of, but riding in an automobile [illegible] time of a collision, the language of the opinion [illegible] of the instruction complained of. [illegible] the jury that anyone entering upon a railroad crossing is required to [illegible] care and caution [illegible], if one is approaching [illegible] such person is required [illegible] valid criticism might be made of the instruction. It may be somewhat hypercritical to say that the instruction should have required the

use of only ordinary care and caution. The language is "care and caution" and if this were its only defect we might not regard the instruction as so erroneous as to authorize a reversal of the judgment, but the instruction in effect told the jury that it was the duty of deceased not to pass over the crossing, if by the exercise of care and caution he could ascertain that a train was approaching. In this particular the instruction is defective in that the evidence shows that deceased had no control of the car and that he might well have been carried onto the tracks by the action of the driver even though he, deceased, had exercised every reasonable precaution to protect himself from injury. In any event, the law did not require deceased to exercise more than ordinary care to protect himself from injury, and, if in the exercise of that care, he became apprised of the approach of the train then it became his duty to give warning to the driver of the cab.

The instruction tells the jury that irrespective of the fact as to whether deceased had any knowledge or notice of the approach of the train he was not to pass over the crossing. The instruction is not limited in its application to the conduct of the driver of the taxicab, it applies to anyone, who under any circumstances might be about to cross a railroad and street intersection. If applied to the facts of the present case it might have imposed an impossibility upon deceased. He was seated in the cab as a passenger, or at least as a guest of the driver and he had no direct control over the operation of the car; other given instructions required deceased to exercise ordinary care for his own safety and to keep a lookout for the approach of trains and if he became apprised thereof, that is, of the approach of a train, to give due warning to the driver of the cab. These instructions which also are complained of state

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for his own safety and to keep a journey, for the ebbration of
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cap as a pocketbook, or of trust or trust of the driver or
imposed on impossibility upon discovery. He was trusted in the
evasion. It applied to the facts of the present case it might have
circumstances might be shown a fiction and stood interpre-
tation of the terms, i.e. to fill in the blank, who under any
transaction is not likely. In its modification to the consent of
ebbroach of the train he was not to pass over the crossing. The
fact as to whether or not he had any knowledge or notice of the
The instruction left the jury just tremendous of the
of the car from it became his duty to give warning to the driver
in the exercise of such care, he became subjected of the an ocean
more than ordinarily done to prevent himself from injury, and, if
injury. In any event, the law did not require conserve to exercise
but exercising only reasonable or caution to prevent himself from
the smoke by the motion of the driver even though he, deceased,
control of the car and if he might well have been carried onto
in defective in that the original claim that deceased had no
a train was opportunity. In this particular the instruction
it be the exercise of care and caution be such reasonable that
that it was the duty of deceased not to pass over the crossing,
of the judgment, but the instruction in effect told the jury
that instruction as to circumstances to an injuries a reasonably
and caution" and it only meant the only injury we might not re-
me of only ordinary care and caution. The testimony is "care

rules sufficiently rigorous as applied to the conduct of deceased. The instruction in question, however, imposed a further and perhaps, under the circumstances which actually existed at the time of the accident, an impossible duty upon deceased not to pass over the tracks. Counsel for defendant in reply to the criticism of this instruction say that the only obligation imposed by the instruction upon deceased was "to use care and caution to ascertain whether a train was approaching, and if a train was approaching to give the train the right-of-way." It is quite conceivable that on the admitted facts of the case the deceased, while in the exercise of ordinary care and caution for his own safety, without his consent, might have been carried onto the tracks by conduct of the driver which deceased could not control. It does not therefore answer the objections made to the instruction to say that the deceased should have given the approaching train the right-of-way if he, deceased, by the exercise of care and caution could ascertain that it was approaching.

In the case of C. & St. L. & P. R. R. Co. v. Hutchinson, 120 Ill., 593, the Supreme Court criticized the following instruction:

> "The jury are instructed that it was the duty of the plaintiff, before crossing the tracks upon which the collision occurred, to look in both directions for the approach of any train. It was also his duty to observe any warning given of the approach of any train, and if he had any notice that a train was near, and was about to pass along in front of him, it was his duty to stop and wait until the same had passed."

In its decision the court said:

> "We are aware of expressions by this court when passing upon the law and fact, and of like expressions of other courts of the highest respectability, that the failure of one approaching a railroad crossing to pause and look for the approach of trains, was such negligence as would, in the case then under consideration, preclude a recovery. But we are not prepared to say, as a matter of law, that a person approaching a railroad crossing, where there is nothing apparent to warn him of danger,

> and at which he knows a flagman is stationed, whose known duty it is to warn all persons of danger, from running trains, is required to look elsewhere than to the flagman.
>
> * * * * * * *
>
> "It may be, that in the particular case a reasonably prudent and careful man would do more than observe the absence of the ordinary signal by the flagman. But if so, the facts and circumstances should be submitted to the jury to be considered by them in determining whether the party had, under all the circumstances, exercised ordinary care and caution to prevent injury."

In C. & E. I. Ry. Co. v. Dunleavy, 129 Ill., 148, the Supreme Court said:

> "Undoubtedly a failure to look or listen especially where it affirmatively appears that looking and listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence so that a charge of negligence can be predicated upon them as a matter of law."

It is our opinion that the instruction, even if applied solely to the conduct of the driver might well be the subject of criticism; clearly, it was error to give the instruction where, as in the present case, it appears that deceased had no control over the operation of the car.

The judgment of the Superior Court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

Matchett, J., concurs.
McSurely, J., dissents.

* * * * * *

"It may be, that in the particular case a reasonably prudent man would be more than observant if he were. But if so, the facts and circumstances should be furnished by the jury in their verdict. But where the ordinary person would not observe, and where the facts and circumstances do not disclose any unusual circumstance, under all the circumstances in the case it requires no previous injury."

In J. & E. Ry. Co. v. Mayberry, 129 Ill., 548, the Supreme Court said:

"Ordinarily a prudent person does not look or listen especially where it unreasonably obstructs that looking and listening might have enabled the party exposed to injury to see the train and also avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence so that a charge of negligence can be predicated upon them as a matter of law."

It is our opinion that the instruction, even if applied

solely to the conduct of the driver might well be said of

extinction; clearly, it was error to give the instruction there,

as in the present case, it was error of a character not to be cured by

over the operation of the car.

The judgment of the Superior Court will be reversed

and the cause remanded to that court for a new trial.

KAY KENYON AND STEARNS, J.

Mayberry, 1.- Contra.
Matchett, 1.- Contra.

95 - 26751

VAN A. WEBSTER for the use of AUTOMOBILE UNDERWRITERS OF AMERICA,
Appellant,

vs.

ZINTER CARTAGE COMPANY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 631

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court to recover the sum of $437.33, being premiums alleged to have been earned on six policies of automobile insurance issued to defendant.

On the trial it was stipulated that plaintiff delivered to defendant five policies of insurance in March, 1920, and a sixth policy on April 5, 1920. Defendant retained these policies until June 16,1920, when it returned all of them to plaintiff and at the same time set up a claim that the policies had been automatically cancelled "by a 30 days'" clause in each of them. Defendant paid nothing on account of premiums upon any of the policies and it was stipulated that premiums earned thereon to June 16, 1920, amounted to $437.33, the sum sued for. Judgment was entered in the trial court in favor of the defendant and plaintiff appeals. No appearance has been filed in this court on behalf of appellee.

A clause in the policies provided that unless the premium provided for therein be paid within thirty days from the date of each policy, the policies would become void from the beginning. It is argued that defendant had no legal right to rely upon this provision because by mutual agreement between the parties the premiums were to be paid in six monthly installments; and further, because the "thirty

35 - 26751

VAN A. WERTHEIMER for the use of AUTOMOBILE UNDERWRITERS OF AMERICA,
Appellants,

vs.

ZINTER CARRIAGE COMPANY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

262 I.A. 557

MR. PRESIDING JUSTICE [illegible]

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court to recover the sum of $497.35, being premiums alleged to have been earned on six policies of automobile insurance issued to defendant.

On the trial it was stipulated that plaintiff delivered to defendant five policies of insurance in March, 1930, and a sixth policy on April 5, 1930. Defendant retained these policies until June 16, 1930, when it returned all of them to plaintiff and at the same time set up a claim that the policies had been automatically cancelled "by a 30 days" clause in each of them. Defendant paid nothing on account of premiums on any of the policies and it was stipulated that the premiums earned thereon to June 16, 1930, amounted to $497.35, the sum sued for. Judgment was entered in the trial court in favor of the defendant and plaintiff appeals. No appearance has been filed in this court on behalf of appellee.

A clause in the policies provided that unless the premium provided for therein be paid within thirty days from the date of each policy, the policies would become void from the beginning. It is argued that defendant had no legal right to rely upon this provision because by mutual agreement between the parties the premiums were to be paid in six monthly installments; and further that the "thirty

days clause" in the policies was for the benefit of the insurer and could be and, in the present case, was waived by the insurer by extending credit to defendant for payment of the premiums. The evidence shows that defendant agreed to pay the premiums in six monthly payments. This agreement rendered the thirty days clause of the policies inoperative. A provision of the policies required the payment of premiums within thirty days from their date. Plainly, this provision means that in the absence of any other or special agreement the premiums were to be paid on the date of issuance of the policies or within 30 days thereafter. Here, however, the parties specially agreed that the premiums were to be paid in six monthly payments, and the defendant now seeks to escape liability under the contracts by taking advantage of his own default.

There is also force in the contention that the thirty days clause referred to was inserted in the contract for the benefit of the insurer; that it had the right to and that it did, in the interest of defendant, waive the clause in favor of less onerous provisions. People v. Commercial Insurance Co., 247 Ill. 92.

Defendant accepted the policies and kept them in its possession for some months thereafter, and it should not be allowed to escape liability for the premiums by setting up its failure to comply with the terms of the contract.

The judgment of the Municipal court is reversed and judgment entered here in favor of the plaintiff for the sum of $437.33.

REVERSED AND JUDGMENT HERE.

McSurely and Matchett, JJ., concur.

105 - 26761

WILLIAM J. HUGHEY & SON,
A Corporation,
Appellant,

vs.

ILLINOIS INDEMNITY EXCHANGE
and SHERMAN AND ELLIS, Inc.,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

223 I.A. 632

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago against the defendant to recover $779.50, being the amount of compensation awarded by the Illinois Industrial Commission to one of plaintiff's employes who accidently sustained injuries in the course of his employment on August 11, 1919. The case was tried by the court without a jury and findings and judgment were entered against the plaintiff, from which defendant appeals.

Defendant is engaged in the business of writing indemnity insurance for employers. It had issued successively three Workmen's compensation insurance policies to plaintiff for periods of time as follows: From August 10, 1916, to August 10, 1917; from August 1, 1917, to August 1, 1918, and from August 1, 1918, to August 1, 1919. The evidence shows that from August 1, 1918, to August 1, 1919, insured had paid no premiums on the last policy issued, and that there was due defendant on August 1, 1919 on the three policies a total sum of between $700 and $800. That these premiums were due and unpaid on August 1st appears very clearly from the testimony of Oscar Magnuson, who testified for defendant. Evidence for the defendant tends to prove that on June 12, 1919, its general manager advised plaintiff that unless a substantial payment was made on the premium account to May 1,

MR. PRESIDING JUSTICE DEAN

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago against the defendant to recover $370.80, being the amount of compensation awarded by the Illinois Industrial Commission to one of plaintiff's employes who accidently sustained injuries in the course of his employment on August 11, 1919. The cause was tried by the court without a jury and findings and judgment were entered against the plaintiff, from which defendant appeals.

Defendant is engaged in the business of writing indemnity insurance for employers. It had issued successively three Workmen's compensation insurance policies to plaintiff for periods of time as follows: Beginning August 1, 1918, to August 10, 1919; from August 7, 1917, to August 1, 1918, and from August 1, 1916, to August 1, 1919. The evidence shows that from August 1, 1916, to August 1, 1919, inclusive and back to beginning of the last policy issued, and that there was no default of August 1, 1919, to August 7, 1919. Plaintiff's agent called on defendant's agent on the 7th and 8th. That on the three policies a total sum of between $700 and $800. That these premiums were due and unpaid on August 1st although early

1919, within a week and the balance due on the account paid within 30 days, the insurance policy would not be renewed when it expired on August 1, 1919. This notice, which was oral, was confirmed by letter mailed to defendant on the same day. Payment of the premiums due was not made in accordance with the notice nor at any time prior to August 1, 1919, and the policy of insurance was not at that time or thereafter renewed.

The accident occurred on August 11, 1919, and on the following day the insured made a payment of $272 for premiums on the policy which expired August 1, 1919, and which was the only payment made on this policy. The defendant was notified of the accident to insured's employe on August 16, 1919. Defendant wrote plaintiff in part as follows:

> "You were notified both verbally and in writing that your policy expired August 1st and was not renewed. Therefore you will understand that Sherman & Ellis, Associated Employers' Reciprocal is not covering any of your operations subsequent to August 1, 1919."

May 17, 1920, an attorney for plaintiff wrote defendant that plaintiff would insist upon defendant's liability under the policy for any compensation paid plaintiff's employe.

A paragraph of the policy recites that the contract might be terminated upon the first day of January, April, July and October by either party giving the other ten days' notice in writing of an intention so to do, and that in default of payment of premiums due, the contract could by ten days' written notice be cancelled. The policy further provided that the term of insurance was to begin on August 1, 1918, and end on August 1, 1919, and "for annual premiums, for annual periods thereafter until cancelled."

It is our opinion that paragraph No. 11 of the contract, which provides that the contract might be cancelled upon the first day of January, April, July and October upon ten days'

the first day of January, April, July and October upon ten days' notice to the assured, which provides that the contract might be cancelled upon the terms and conditions that paragraph 8c. If of the contract and "for annual premiums, for annual periods thereafter until cancelled."

It is our opinion that paragraph 8c. If of the contract, which provides that the contract might be cancelled upon the first day of January, April, July and October upon ten days' notice to the assured to begin on August 1, 1919, and not on August 1, 1919, as was done in accordance with the notice mor at any time prior to August 1, 1919, and the policy of insurance was not at that time or thereafter renewed.

The accident occurred on August 11, 1919, and on the following day the insured made a payment of $272 for premiums on the policy which expired August 1, 1919, and which was the only payment made on this policy. The defendant was notified of the accident to insured's employe on August 16, 1919. Defendant wrote plaintiff in part as follows:

> "You were notified por, verbally and in writing that your policy expired August 1st and was not renewed. Therefore you will understand that Sherman & Fife, Associated Employers, Sociptocsy is not covering any of your operations suppedment to August 1, 1919."

May 17, 1920, an attorney for plaintiff wrote defendant that plaintiff would insist upon defendant's liability under the policy for any compensation paid plaintiff's employe.

A paragraph of the policy recites that the contract might be terminated upon the first day of January, April, July and October by either party giving the other ten days' notice in writing of an intention so to do, and that in default of payment of premiums due, the contract could by ten days' written notice be cancelled. The policy further provided that the term of insurance was to begin on August 1, 1919, and end on August 1, 1919,

written notice has no application to the facts of the present case; and further, in the absence of evidence properly in the record tending to prove a certain rule of the Illinois Industrial Commission, urged upon our attention, no consideration can be given to the rule, nor can it be regarded as a part of the contract between the parties.

Paragraph No. 11, referred to, relates solely to a right reserved to either party to the contract upon ten days' written notice to cancel the contract. Here, however, we are not required to consider a question as to this right, but one as to whether the contract sued on had actually terminated on August 1, 1919, eleven days before plaintiff's employe was injured.

It is asserted for plaintiff that the clause in the contract "for annual premiums, for annual periods thereafter until cancelled," continued the contract between the parties beyond the date of the accident, and this notwithstanding the fact that the plaintiff had not paid premiums due under the policy sued on and prior policies issued to it. We do not think this is either a fair or reasonable construction of the language quoted. Clearly, it was the intention of both parties that premiums were to be paid for the protection given to plaintiff under the policy. It is true that the policy required the payment of these premiums after an examination of plaintiff's payroll and an adjustment between the parties. The evidence shows, however, that certain of these examinations had been made and bills had been rendered to plaintiff for payments due amounting in all to between seven and eight hundred dollars, and that plaintiff had not paid these premiums.

The evidence discloses that on June 12, 1919, the plaintiff was expressly notified both orally and in writing that unless the premiums due on the policy were paid it would not be

written notice has no application to the facts of the present case; and further, in the absence of evidence properly in the record tending to prove a certain rate of the fifteen industrial Commission, acted upon our attention, no consideration can be given to the rate, nor can it be referred as a part of the contract between the parties.

Remember Mr. It,declared to, relates solely to a right reserved to either party to the contract upon ten days' written notice to cancel the contract. Here, however, we are not required to consider a question as to this right, but one as to whether the contract sued on was voluntarily terminated on August 7, 1919, eleven days before Plaintiff's employe was injured.

It is answered for plaintiff that the clause in the contract "for annual renewals, for succ[illegible] periods thereafter until cancelled," continued the contract between the parties beyond the date of the accident, and this notwithstanding the fact that the plaintiff had not paid premium and no policy ever was issued prior policies issued to it. We do not think she is either a fair or reasonable construction of the language quoted. Clearly, it was the intention of both parties that [illegible] more to be paid for the protection given to [illegible] under the policy.

[illegible] an examination of Plaintiff's [illegible] after an examination of Plaintiff's exhibit not an adjustment between the [illegible]. It is true, however, [illegible] of the policy that the Policy remains in force [illegible] eight months [illegible] Plaintiff has not been required to [illegible] these annual [illegible] but will not [illegible] premium.

The evidence discloses that on June 1, 1919, the plaintiff was six months notified policy [illegible] and in writing that unless the premium due on the policy when [illegible] it would not be

renewed August 1, 1919. If the contention of plaintiff is sound, then the contract would be continued in force even though it appears that premiums due on the policy had never been paid and in face of the fact that plaintiff had been expressly notified that defendant would not permit a renewal of its obligations to plaintiff unless the premiums due were paid as directed by the notice. We think it a fair construction of the notice to hold that the payment of the premiums was a condition precedent to the continuation of the policy after the date of its expiration.

The following paragraph appears in printed form on the back of the policy:

> "If this contract covers any work done in the State of Illinois, the Industrial Board of the State of Illinois has required that this contract shall not be cancelled by either of the parties or be allowed to expire until such board has received not less than ten days' notice of such intended cancellation or contemplated expiration. It is, therefore, agreed that sufficient notice will be given by either party of an intended cancellation or intention not to renew to permit the attorney to give said Industrial Board at least ten days' notice thereof."

This paragraph is followed by the sentence, "In Witness Whereof, the Subscribers have severally executed these presents by and through their duly authorized Attorney-in-Fact." Then follows a blank line for the signature of the attorney-in-fact, that is, one of the defendants. These provisions were not signed by anyone; it does not, therefore, in our judgment, become a part of the contract sued upon. Further than this, when the relationship of the parties and the subject matter of the contract and the express language of the last sentence of the paragraph is considered, it is evident that the paragraph, even if considered a part of the contract, was intended to provide a means whereby the attorney in fact, that is one of the defendants, might be given an opportunity to apprise the Industrial Commission of the in-

renewed August 1, 1919. If the contention of plaintiff is sound, then the contract would be continued in force even though it expire that premium due on the policy had never been paid and in face of the fact that plaintiff had been expressly notified that defendant would not permit a renewal of its obligations to plaintiff until unless the premiums due were paid as directed by the notice. We think it a fair construction of the notice to hold that the payment of the premiums was a condition precedent to the continuation of the policy after the date of its expiration.

The following paragraph appears in printed form on the back of the policy:

> 'If this contract covers any work done in the State of Illinois, the Industrial Board of the State of Illinois has required that this contract shall not be cancelled by either of the parties or be allowed to expire until such bond has remained not less than ten days' notice of such intended cancellation or termination or expiration. It is, therefore, agreed that sufficient notice will be given by either party of an intended cancellation or termination not to renew to permit the attorney to give said Industrial Board at least ten days' notice thereof.'

This paragraph is followed by the sentence, "In witness Whereof, the subscribers have severally executed these presents by and through their duly authorized Attorney-in-Fact." Then follows a blank line for the signature of the attorney-in-fact, that is, one of the defendants. These provisions were not signed by anyone; it does not, therefore, in our judgment, become a part of the contract sued upon. Further than this, when the relationship of the parties and the subject matter of the contract and the extreme length of the last sentence of the paragraph D in the considered, it is evident that the paragraph D, even if construed a part of the contract, was intended to provide a means whereby the defendant could not permit a renewal of its obligations to plaintiff

sured's intention not to renew the contract. The evidence does disclose that defendants notified the Industrial Commission on August 7, 1919, that the policy issued to plaintiff expired on August 1st and was not renewed; that on August 11, 1919, the Commission in written acknowledgment of this notice, stated to defendants that in compliance with rule 26 adopted by the Commission, the termination of the policy would be effective as of August 18, 1919. This latter notice to the defendants did not, and could not, become a part of the contract. Rule 26 of the Commission was not admitted in evidence and is therefore not before us. Whatever may be said of any rights accruing under the paragraph either in the Commission or the parties to the contract, it seems evident that the purpose of this paragraph was to require sufficient notice of an intention to cancel or terminate the contract, so that the attorney-in-fact (one of the defendants) might give the Industrial Commission at least ten days' notice thereof, and so far as the insured is concerned, the evidence does disclose that he had ample notice to enable him to protect his rights, if any, under the policy. The insurer does not complain in the proceeding of a lack of notice, and the evidence shows that insured in fact had actual and sufficient notice that the policy would expire on August 1, 1919. While we have not been aided in the solution of the question under consideration by a citation of any authority whatsoever, we are inclined to agree with the contention that assured was only legally entitled to the notice which was given to it of the intention of defendants not to renew the policy.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

Respectfully submitted, J.T. Jones.

AMAIN CO.

The judgment of the Municipal Court is affirmed.

the policy.

apion was given by it of the insertion of defendants not to renew the condition that was only tacitly notified to the notice ciation of any successful assessment, we are inclined to agree with aided in the notification of the insured under notification if a the policy would expire on August 1, 1916. This we have not been upon the return of the insured to cancel. No notification other than theirs is of any weight in the matter. The insurer even not cancelled in the absence of a by-law of notice, was the evidence tent his right, if any, to do the policy. The insurer even not device does disclose that he did supply notice to enable him to pronotice thereof, and so the insured in cancelling, the evifandants) might give the Industrial Commission at least ten days' mate the contract, to that the statutory-in-fact (one of the dorequire sufficient notice of an intention to cancel or terminate, it means evident that the purpose of this provision was the purpose either in the commission or the parties to the before me. Whatever may be said of any rights accruing under Commission was not admitted in evidence and is therefore not and could not, become a part of the contract. Sub 16 of the August 16, 1916. This letter notice to the defendants did not, mission, the termination of the policy would be effective as of defendants that in compliance with rule 36 adopted by the Commission in written acknowledgment of this notice, stated to August 1st and as not renewed; that on August 11, 1916, the August 7, 1916, that the policy issued to plaintiff expired on diagnose that defendants notified the Industrial Commission on

113 - 26770

NELLIE B. ELDRED, Administratrix of the Estate of Frank W. Eldred, Deceased,

Appellant,

vs.

CELIA T. ELDRED, Individually and as Executrix of the Will of Fred E. Eldred, Deceased, HELEN L. HOTCHKISS, FRED M. ELDRED and JEROME HUESTIS, Administrator c. t. a. of the Estate of Fred E. Eldred, Deceased,

Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

323 Ill. App. 332

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Frank W. Eldred filed a bill of complaint in the Superior court of Cook County in which he prayed that Celia T. Eldred individually and as executrix of the last will of Fred E. Eldred, deceased, and Jerome Huestis, administrator with the will annexed of said estate, be required to account to complainant for money received and appropriated to his own use by Fred E. Eldred derived from the sale of certain real estate which the bill alleged was owned prior to his death by Fred E. Eldred and complainant as tenants in common.

The bill charged that the tenancy in common in the real estate was derived by devise under the last will of Delos W. Eldred, who died March 16, 1903, and who by his last will devised and bequeathed the residue of his estate to Fred E. and Frank W. Eldred, his sons.

Frank W. Eldred died while the suit was pending in the Superior court and Nellie B. Eldred, administratrix of his estate, was substituted as complainant.

The original bill alleged inter alia that Frank W.

KERLIN E. JONES, Administratrix of the Estate of Frank T. Eldred, Deceased,

Appellant,

vs.

CECILIA T. ELDRED, individually and as Executrix of the Will of Frank T. Eldred, Deceased, ETAL.,

HOTCHKISS, ETAL., HOLDEN and LEMON HUBBELL, Administrator c. t. a. of the Estate of Fred X. Eldred, Deceased,

Appellees.

Upon Appeal from the Superior Court of Cook County, in which Cecilia T. Eldred, individually and as Executrix of the Will of Frank T. Eldred, deceased, and Jerome Hubbell, administrator with the will annexed of said estate, be required to account to complainant for money received and misappropriated in his own use by Fred X. Eldred derived from the sale of certain real estate which the Will alleged was owned prior to his death by Frank T. Eldred and subsequently sold by defendant Cecilia T. Eldred, who died March 16, 1903, and who by his last will devised and bequeathed the residue of his estate to Fred X. Eldred, his son.

Frank T. Eldred died while the suit was pending in the Superior Court and Cecilia T. Eldred, administratrix of his estate, was substituted as complainant.

The original bill alleged (after alleging that Frank T. Eldred died seized of a large real estate and personal property, and that Cecilia T. Eldred was appointed executrix of his Will and duly qualified as such, and that Fred X. Eldred was the only child and heir at law of said Frank T. Eldred, deceased) that Cecilia T. Eldred, executrix of the Will of Frank T. Eldred, deceased, and Jerome Hubbell, administrator with the will annexed of said estate, be required to account to complainant for money received and misappropriated in his own use by Fred X. Eldred derived from the sale of certain real estate which the Will alleged was owned prior to his death by Frank T. Eldred and subsequently sold by defendant Cecilia T. Eldred, who died March 16, 1903, and who by his last will devised and bequeathed the residue of his estate to Fred X. Eldred, his son.

Frank T. Eldred died while the suit was pending in the Superior Court and Cecilia T. Eldred, administratrix of his estate, was substituted as complainant.

The original bill alleged (after alleging that Frank T.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE DUNN

DELIVERED THE OPINION OF THE COURT.

Frank T. Eldred filed a bill of complaint in the Superior court of Cook County in which he prayed that Cecilia T. Eldred individually and as executrix of the last will of Fred X. Eldred, deceased, and Jerome Hubbell, administrator with the

Eldred and Fred E. Eldred had entered into a general copartnership for the purpose of managing, buying and selling real estate, and that each had contributed thereto his interest in the real estate derived by them under the will of their father; that this copartnership continued until January 2, 1915, when Fred E. Eldred died; that a considerable part of this real estate had been sold under the copartnership agreement by Fred Eldred and that he had failed to account to Frank W. Eldred for his fair share of the proceeds of such sales.

The answer filed admitted certain allegations of the bill, but denied the existence of a copartnership between Frank W. Eldred and Fred E. Eldred, and it alleged that all the business done by Fred E. Eldred and Frank W. Eldred in connection with the sale of real estate was transacted by them as tenants in common.

It was alleged in the bill and the answer admitted that Frank W. Eldred and Fred E. Eldred were tenants in common of certain parcels of real estate, part of which was located in the state of California. The answer, however, denied that Fred E. Eldred applied to his own use out of the receipts of any sales of the real estate more than his lawful and rightful share of said receipts, and it alleged that Fred E. Eldred had fully accounted to Frank W. Eldred for any part of the receipts or profits derived from the sale of any real estate in which they were interested as tenants in common.

The cause was referred to a master in chancery to take evidence and report his conclusions thereon. The master reported, among other things, that on June 24, 1903, Frank W. Eldred and his wife authorized, by power of attorney, Fred E. Eldred generally to sell, mortgage and convey by contract, deed or other instrument in writing their interest in real estate or

Aldred and Fred X. Aldred had entered into a general copartnership for the purpose of mortgaging, buying and selling real estate, and that each had contributed thereto his interest in the real estate derived by them under the will of their father; that this copartnership continued until January 3, 1913, when Fred B. Aldred died; that a considerable part of this real estate had been sold under the copartnership agreement by Fred Aldred and that he had failed to account to Frank W. Aldred for his fair share of the proceeds of such sales.

The answer filed admitted certain allegations of the bill, but denied the existence of a copartnership between Frank W. Aldred and Fred . Aldred, and it alleged that all the business done by Fred X. Aldred and Frank C. Aldred in connection with the sale of real estate was transacted by them as tenants in common.

It was alleged in the bill and the answer admitted that Frank B. Aldred and Fred X. Aldred were tenants in common of certain parcels of real estate, part of which was located in the state of California. The answer, however, denied that Fred X. Aldred applied to his own use any of the receipts of any sales of the real estate more than his lawful and rightful share of said receipts, and it alleged that Fred B. Aldred had fully accounted to Frank W. Aldred for any part of the receipts or profits derived from the sale of any real estate in which they were interested as tenants in common.

The cause was referred to a master in chancery to take evidence and report his conclusions thereon. The master reported, among other things, that on June 24, 1919, Frank W. Aldred and his wife authorized, by power of attorney, Fred X. Aldred formally to sell, mortgage and convey by contract, deed or other instrument to settle their interest in real estate or

personal property located in the state of California, derived by them under the will of Delos W. Eldred; that under said power of attorney Fred E. Eldred had transferred to his personal account the sum of $1,348.02 on deposit in a bank in Los Angeles, California, in the name of Delos W. Eldred; that Fred E. Eldred had taken charge of the real estate in which he and Frank W. Eldred were jointly interested; that Fred E. Eldred had, through the agency of the Citizens National Bank of Los Angeles, received payment on contracts for the sale of parts of this real estate; that he had executed deeds to parties who had completed payments on contracts to the Citizens National Bank; that such deeds were executed by Fred E. Eldred individually and as attorney in fact for Frank W. Eldred; that the payments received under the contracts for sale of the real estate were credited by Fred E. Eldred to his individual account from the time that the power of attorney was executed down to the date of his death January 2, 1915; that certain books of account, deeds and contracts for the sale of real estate in the handwriting of Fred E. Eldred and also certain checks and vouchers in his handwriting drawn in connection with the sales of real estate in California were found among the effects of Fred E. Eldred after his death, payments for which, collected by Citizens National Bank, had been credited by the bank to the account of Fred E. Eldred. The master also found that Frank W. Eldred had charge of real estate in Chicago owned in common by him and Fred E. Eldred, and that he, Frank W. Eldred, had kept books of account of his dealings therein and had advanced certain moneys derived from their sale to Fred E. Eldred.

The master further found that Fred E. Eldred and Frank W. Eldred were not engaged as copartners, dealing in real estate; that they were jointly interested as tenants in common

personal property located in the state of California, derived by them under the will of Delos W. Eldred; that owner paid power of attorney Fred E. Eldred had transferred to his personal account the sum of $1,348.02 on deposit in a bank in Los Angeles, California, in the name of Delos .. Eldred; that Fred E. Eldred had taken charge of the real estate in Wilson Re and Frank W. Eldred were jointly interested; that Fred E. Eldred had, through the agency of the Gilmore National Bank of Los Angeles, received payment on contracts for the sale of parts of this real estate; that he had executed deeds to parties who had completed payments on contracts to the Gilmore National Bank; that such deeds were executed by Fred W. Eldred individually and as attorney in fact for Frank W. Eldred; that the payments received under the contracts for sale of the real estate were executed by Fred E. Eldred to his individual account from the time that the power of attorney was executed down to the date of his death January 5, 1931; that certain books of account, deeds and contracts for the sale of real estate in the woodwriting of Fred E. Eldred and also certain checks and vouchers in his handwriting drawn in connection with the sales of real estate in California were found among the effects of Fred E. Eldred after his death, payments for which, collected by Gilmore National Bank, had been credited by the bank to the account of Fred E. Eldred. The master also found that Fred E. Eldred had charge of real estate in Chicago owned in common by him and Fred E. Eldred, and that he, Frank W. Eldred, had kept books of account of his dealings therein and had advanced certain moneys derived from their sale to Fred E. Eldred.

The master further found that Fred E. Eldred and Frank W. Eldred were not entitled to commissions dealing in real estate; that they were jointly interested as tenants in common

of the lands devised to them by the will of their father, and in sales of certain of these lands; and the master, after stating the account in his report, found that there was due the estate of Frank W. Eldred, deceased, from the estate of Fred E. Eldred, deceased, the sum of $17,677.13. Exceptions were filed to this report by defendants, all of which were sustained by order of court entered on May 8, 1920.

On May 24, 1920, the court gave leave to complainant to file an amended bill instanter and a rule was entered that defendant plead, answer or demur thereto within twenty days. An amended bill was filed in which it is not charged that a co-partnership existed between Frank W. Eldred and Fred E. Eldred to deal in real estate. In other respects the amended bill is substantially like the original bill and it seeks an accounting on allegations that Frank W. and Fred E. Eldred were jointly interested in selling and disposing of real estate as tenants in common. An answer filed to the amended bill in substance is similar to that filed to the original bill and denial is made therein that Fred E. Eldred had during his lifetime received and applied to his own use more than his proper share of the profits from sales of the real estate. Complainant filed a replication to this answer. On November 27, 1920, the court entered an order dismissing the amended bill for want of equity, from which order complainant appeals to this court.

While the record is not clear as to what was in the mind of the court or counsel at the time the order of dismissal was entered, we gather that complainant tendered her amended bill on the theory that she had a right to amend after the evidence had been taken, so that the allegations upon which she based her right to an accounting might conform to the proofs admitted in the cause.

to an accounting might concern to the profits accounted in the cause. been taken, so that the allegations upon which she based her right on the theory that she had a right to amend after the evidence had was entered, we further that complainant tendered her amended bill mind of the court or assumed at the time the order of dismissal

While the record is not clear as to what was in the supplemental papers to this court.

missing the amended bill for want of equity, from which order cause. On November 27, 1933, the court entered an order dismissing the bill of the real estate. Complainant filed a replication to this his own use more than his proper share of the profits from sales Fred E. Eldred died during the lifetime received and applied to that filed to the original bill was material to made therein that was. An answer filed to the amended bill in writing to it\ deal in real estate. In other respects the amended bill is substantially like the original bill and it seeks an accounting on allegations that Frank W. and Fred V. Eldred were jointly interested in selling and disposing of real estate as tenants in common and partnership existed between Frank W. Eldred and Fred E. Eldred to defendant pleas, answer or demur thereto within twenty days. An amended bill was filed in which it is not charged that a to file an amended bill instanter and a rule was entered that

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The abstract of record shows that a motion was made for leave to file the amended bill to conform to the evidence taken. This motion was originally made before the court had disposed of exceptions to the master's report. Leave to file the amended bill was not granted until after the exceptions had been ruled upon and sustained. The court seems to have been of the opinion that the new pleadings amounted to the bringing of a new suit and he suggested that the issues raised thereunder be referred to a master to take proofs, etc. Counsel for complainant, however, stated that he had no further proofs to offer and he requested that the evidence which had already been taken under the original pleadings be considered by the court as evidence tending to prove or disprove the issues of fact raised under the new pleadings. This the court declined to do, hence the order dismissing the amended bill for want of equity.

For the defendants it is insisted that the evidence taken is wholly inapplicable to the case made by the amended bill and insufficient to warrant a decree thereunder; that if the court erred in failing to refer the cause on the amended bill to the master, such error was invited by complainant's refusal to offer any new proof thereunder. Under the allegations of the original bill complainant's right to an accounting was based in part upon the charge that a copartnership existed between Fred E. Eldred and Frank W. Eldred with reference to the real estate owned by them as tenants in common. The evidence does not sustain this charge. The master found that no such copartnership existed and that the interest of each of the persons named was merely an interest as tenant in common in the real estate. The amended bill proceeds not upon a theory of copartnership, but that of a tenancy in common in the real estate, and we have to determine whether the allegations of the amended bill were so germane to the allegations

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of the original bill and the relief prayed thereunder as that the trial court should have permitted the evidence taken under the first bill to stand as evidence to be considered under the amended bill.

It is elementary that where a trustee of funds applies the same to his personal use he may be required to render an account therefor to the cestui que trust. Where it appears that one tenant in common has received more than his proper share of rents and profits derived from the sale or use of the common estate, the cotenant may compel him to account therefor by bill in chancery for an accounting. Cheney v. Ricks, 187 Ill., 173; "the liability of one cotenant to account to another may arise either from receiving from a third party more than his share of the rents and profits, or from his appropriating to his own use more than his proportion of the common estate. (Angelo v. Angelo, 146 Ill. 629.) The remedy is by action to compel an accounting."

As disclosed by both the original bill and the amended bill, the complainant sought to compel an accounting for moneys received by Fred E. Eldred on the joint account of himself and Frank W. Eldred. The prayer in each bill is for an accounting and the right thereto, as shown by both bills, is based upon identical facts. Stated otherwise, it is shown by both bills that the right to an accounting is predicated upon the charge that Fred E. and Frank W. Eldred were tenants in common of certain real estate; that Fred E. was authorized by power of attorney to deal therewith on behalf of Frank W. and that he, Fred E. Eldred, had as a consequence of this authority disposed of the property by contracts and deeds and had received and appropriated to his own use moneys paid to him by third parties for the joint benefit of himself and Frank W. Eldred. It is true that in the original bill the pleader concluded that the relationship between the

bill the pleader concluded that the relationship between himself and Frank v. Mildred. It is true that in the original use money paid to him by third parties for the joint benefit of counsel and wife had received not physicalized to his own use as a conversion as of this authority disposed of the property by therewith on behalf of Frank K. and then he, Fred v. Jined, had estate; that Fred K. was authorized by power of attorney to deal E. and Frank v. Mildred were tenants in common of certain real right to an accounting is predicated upon the theory that Fred sal facts. Stated otherwise, it is given by both bills that the and the right thereto, as shown by both bills, is based upon inciamended bill. the complainant cannot to compel an accounting for manage received by Fred v. Mildred on the joint account of himself and Frank v. Jined. The answer in each bill is for an accounting

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the rents and profits, or from his appropriating to his own use more than his proportion of the common estate. (Annois v. Annois, 146 Ill. 622.) The remedy is by motion to compel an accounting." either from receiving from a third party more than his share of the time necessary for an adjusting. (Cheney v. Hicks, 187 Ill., 129; tenancy, the interest may compel him to account therefor by bill of tenants are properly derived from the use or use of the common estate, the interest may compel him to account therefor by bill

bine the name to his personal use be may be required to render an account therefor to the equity suit court. Where it appears that one tenant in common has received more than his proper share

It is elementary that where a trustee of funds ap-

bill. pointed by the original bill and the relief prayed thereunder as that the trial court should have permitted the evidence taken under the first bill to stand as evidence to be considered under the amended

brothers, as shown by the bill, established a copartnership. This error, if it was an error, however, would not in our opinion preclude complainant from asserting by amended bill a substantive right, also charged in the original bill, to an accounting predicated upon a charge that Frank W. and Fred E. Eldred were interested in the property, not as copartners but as tenants in common.

In the case of Allen v. Woodruff, 96 Ill., 11, it was held that where the actual facts are correctly stated in a bill and proved, it is the duty of the court to render such decree and grant such relief as the law requires from such facts, without regard to the theory of the pleader in framing the bill. "His rights must depend upon the actual facts stated, and not upon the erroneous conclusions of the pleader with respect to them."

In the case of Prentice v. Crane, 234 Ill., 302, the court held that:

> "A complainant may amend his bill to meet the proof after the evidence has been heard, and if the defendant desires to procure additional evidence after the amendment he should ask for time in which to procure and present the same, otherwise his position is no different than if the matters introduced by the amendment had been in the bill originally."

Apparently the amended bill was dismissed for want of equity because the chancellor was of the opinion that the filing thereof amounted to the beginning of another suit and that the evidence taken by the master was insufficient to sustain the allegations of the original bill because that bill alleged a copartnership. We are of the opinion that the order should be reversed for the reason that it appears from the allegations of both bills and from the evidence taken by the master that the complainant was entitled to an accounting even though the original bill erroneously charged the existence of a copartnership. No new issues of fact were presented by the new pleadings. The complainant had the right, if she saw fit to exercise it, to stand upon

not had the right, if one can fit in exercise it, to cancel upon issues of fact were presented by the new pleadings. The contingent bill structure changed the existence of a subsequent condition and relieved, or at least altered each thereof the original bill from the evidence taken by the master that the vested for the reason that it separate from the allegations of partnership. In view of the opinion that the order should be relieved because the "conclusion" was of the opinion that the filing thereof resulted in the perjuring of another suit and that the evidence taken by the master was sufficient to sustain the allegations of the original bill because that bill alleged a conspiracy between the defendants and others to defraud by the agreement in question of equity because the "conclusion" was of the opinion that the

Alternatively the amended bill was dismissed for want

> "A complainant may amend his bill to meet the proof after the evidence has been heard, and if the defendant desires to produce additional evidence after the amendment he should ask for time in which to prepare and present his case, otherwise the pleading is no different than if the matters introduced by the amendment had been in the bill originally."

In the case of Hamilton v. Crane, 234 Ill., 302, the court said that:

> "A complainant may amend his bill to meet the proof after the evidence has been heard, and if the defendant desires to produce additional evidence after the amendment he should ask for time in which to prepare and present his case, otherwise the pleading is no different than if the matters introduced by the amendment had been in the bill originally."

In the case of Hilton v. Woodruff, 86 Ill., 11, it was held that where the owner fee and correctly stated in a bill and proved, it is the duty of the court to render such decree and grant such relief as the law requires from such facts, without regard to the theory of the pleader in framing the bill. "His rights must depend upon the actual facts stated, and not upon the erroneous construction of the pleader with regard to them."

the proofs taken under the original bill in support of the amended bill. Having shown her right to an accounting under either or both bills, the court should have allowed the evidence taken under the original bill to stand as evidence to be considered in proof or disproof of the issues presented under the new pleadings. We do not think proper practice required either or both of the parties to the suit to submit to a re-reference of the cause to the master for the purpose of retaking at considerable expense and much trouble evidence already taken under the original pleadings, no new fact or facts having been alleged in subsequent pleadings which changed in the slightest degree the matters actually in controversy between the parties. Counsel for defendants in the trial court urged that under the proofs taken by the master, in that it did not disclose that a copartnership existed, as alleged, defendants could not be compelled to account under the original bill. This position seems to have been sustained in the trial court and counsel seem also to have taken the position that when the chancellor suggested a reference to the master of the issues presented by the new pleadings, that defendant's proof should not be required until after complainant had submitted proof under her amended bill. On complainant's refusal to do so the amended bill was dismissed for want of equity. We think this was error and the order will be reversed with directions to the trial court to enter an order in the cause finding that complainant is entitled to an accounting upon evidence already taken and also to refer the cause to a master to state the account and to take additional proofs if necessary, if any is offered, and report his conclusions thereon to the trial court; the cause to proceed thereafter in accordance with usual practice.

The order of the Superior court is reversed and the cause remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and Matchett, JJ., concur.

134 - 26792

In Re Estate of WILLIAM STROHMEIER, Deceased.
On Appeal of WILLIAM WALTKING, Executor of Estate of William Strohmeier, Deceased,
Appellant,

vs.

HENRY WILLMS,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

223 I.A. 632

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

William Strohmeier died on the 15th day of July, 1919. Prior to his death in May, 1919, he operated a saloon at number 932 West Lake street, Chicago, and plaintiff at the time owned and operated a hotel at number 1035 West Lake street. After the death of Strohmeier plaintiff filed a claim against his estate based upon the alleged promissory note following:

"$840.00 Chicago, May 8, 1919.
Three months after day for value received I promise to pay to the order of Henry Willms Eight Hundred and Forty ($840.00) Dollars at Chicago, Ill., with interest at six per cent per annum after date until paid.
Signed Wm. Strohmeier."

On a hearing in the Probate court the claim was allowed and William Waltking, executor of the estate, appealed the cause to the Circuit court of Cook county, where a trial was had de novo before a jury which returned a verdict in favor of the claimant. Judgment was entered upon the verdict and defendant brings the case here by appeal for review.

The defendant insists that Strohmeier's signature on the note is a forgery. Evidence introduced upon the trial shows that the claimant and deceased had been acquainted and were friends of years standing. At the time of his death de-

154 - 26798

In Re Estate of WILLIAM ST[illegible], Deceased.
On Appeal of [illegible], Executor of Estate of William Strohmeier, Deceased, Appellant,

vs.

[illegible], Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

220 I.A. 632

MR. [illegible] DELIVERED THE OPINION OF THE COURT.

William Strohmeier died on the 15th day of July, 1919. Prior to his death in May, 1925, he operated a saloon at number 932 East Lake Street, Chicago, and plaintiff at the time owned and operated a hotel at number 1078 East Lake Street. After the death of decedent plaintiff filed a claim against his estate based upon the alleged promissory note following:

"$846.00 Chicago, May 3, 1919.
Three months after date for value received I promise to pay to the order of [illegible] Eight Hundred and Forty [illegible] Dollars at Chicago, Ill., with interest at six per cent per annum after date until paid.
(Signed) Wm. Strohmeier."

In [illegible] court the claim was allowed and William [illegible], executor of the estate, appealed the cause to the circuit court of Cook county, where a trial was had de novo [illegible] jury [illegible] returned a verdict in favor of the claim [illegible] judgment was entered upon the verdict and defendant [illegible] the case here by appeal for review.

The defendant [illegible] Strohmeier's signature on the note [illegible]. The evidence introduced upon the trial shows that the claimant and decedent had been acquainted and were friends of years standing. At the time of his death de-

ceased had on deposit in three banks in Chicago a total sum of more than $21,000, $16769.24 of which was on deposit in the First Trust & Savings Bank of Chicago, $4,070.81 in the Central Trust Company of Illinois, and $1,582.85 in the Market Trust & Savings Bank of Chicago. In addition to this he owned certain real estate and was possessed of Liberty bonds of the face value of $2100. The sums to the credit of deceased in the banks mentioned were deposited in various amounts on different dates. Only two withdrawals were made by him from his account in the Central Trust Company after April 8, 1911, and only one withdrawal was made from his account in the First Trust & Savings Bank during the year 1919. The account, however, in the Market Trust & Savings Bank shows several deposits made during the months of April, May and June, 1919, and frequent withdrawals were made therefrom following the month of January of that year. This account shows that on March 8, 1918, Strohmeier withdrew $1000 from this bank and that he had subsequent to that date withdrawn various sums therefrom; he had not at any time requested a loan or borrowed money from the banks.

Two witnesses testified in the Circuit court on behalf of the plaintiff; one of these, Kleinau, testified in substance that he was indebted to the claimant in the sum of $350 on a note secured by a chattel mortgage on an automobile; that by arrangement with Willms, claimant, he met him and Strohmeier on the corner of Clark and Randolph streets, Chicago, about two o'clock May 8, 1919; that the three men rode on an elevator to the office of Mr. Schulman, an attorney; that the only persons present in the office were Schulman, Strohmeier, deceased, Willms, claimant, and Kleinau, the witness; that he saw Willms write the note in question and that Strohmeier signed it; that Strohmeier brought a blank note with him and

signed it; that Strohmeier brought a block note with him and saw Willis write the note in order to find that Strohmeier endorsed it; Stewart, and Fleiner, the witness; that he deposited $1100, Stewart, $1100.04 of which was on deposit in the First Trust & Savings Bank of Chicago, $4,044.31 in the Central Trust Company of Illinois, and $1,885.65 in the Berwyn Trust & Savings Bank of Chicago. In addition to this he owned certain real estate and may be entered of library books of the face value of $2100. The suma to the credit of deposed in the banks mentioned were deposits. In various amounts on different dates. Only two signatures were made by him from his account in the Central Trust Company after April 4, 1911, and only one withdrawal was made from his account in the First Trust & Savings Bank during the year 1910. The account, however, in the Berwyn Trust & Savings Bank shows several deposits made during the months of April, May and June, 1910, and Strohmeier withdrawals were made therefrom following the month of January of that year. This account shows that on March 4, 1910, Strohmeier withdrew $1000 from this bank and that he had endorsed to that date

Two witnesses testified in the Circuit court on behalf of the plaintiff; one of these, Fleiner, testified in substance that he was invited to the claimant in the suit by $150 or a more accurate by a checked workpiece on an automobile; that by arrangement with Attys, claimant, he met him and Strohmeier in the office of Atty. Stewart and Gladstone Atwell, Chicago, about two o'clock May 4, 1911; that the three men rode on an elevator to the office of Mr. Stewart, at which time; that he saw Willis write the note in order to find that Strohmeier

gave it to Willms; that he, Strohmeier, had other blank notes in his pocket; that at this time the witness paid Willms the $350, and that Willms, putting other money with it, passed it to Strohmeier, who placed it in his pocket; that $840 was counted out loud in the presence of the witness. To say the least, the testimony of this witness is unreliable. He was a witness for claimant in the Probate court when the matter was on hearing before that court, and the stenographer who took notes of his testimony testified to statements made by the witness which contradicted his testimony in the Circuit court on many material points. According to these notes Kleinau stated in the Probate court that the parties walked up to Shulman's office. Kleinau said in the Circuit court that Strohmeier brought a blank note with him, whereas he testified in the Probate court that Willms took the blank note out of his, Willms', pocket. In the Probate court he stated that Strohmeier signed the note sitting down; in the Circuit court he said that he signed it standing up leaning over the table; in the Circuit court he stated that the $350 paid by him to Willms was paid in "twenties and tens," yet in the Probate court he testified that he paid the money in "three one hundred dollar bills, two twenties and one ten." In the Probate court he said that he paid interest on the note, whereas in the Circuit court he denied that he paid any interest thereon, notwithstanding the fact that the note bore interest at the rate of six per cent.

The testimony of the attorney with relation to what occurred in his office is somewhat vague. He testified that deceased at the time talked about needing money to buy whiskey and that the claimant had offered to give him some. While it is sought to make it appear that the three persons involved in the transaction went to Shulman's private office as a mere matter of

transaction went to Dingman's private office on a more matter of
sought to make it appear that the three persons involved in the
deal that the signature and offered to give him some. While it is
doubted at the time coined about mounting wonder it may without
occurred in his office to somewhat vague. He testified that
to Strohmeier, who placed it in his pocket; that $840 was counted
$880, and that William, putting other money with it, passed it
in his pocket; that at this time the witness paid William the
knew it to William; that he, Strohmeier, had other blank notes
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court he took a that Strohmeier signed the note stating down; in
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knew it to William; that he, Strohmeier, had other blank notes

convenience, it is a very fair argument that their presence there is accounted for by the fact that whatever the nature of the transaction may have been, they were desirous of having the aid of counsel in executing it. Notwithstanding this, the attorney appears to have paid only very casual attention to what transpired in his office. He did not draw the note in question nor did he attend to its execution; nor did he take any part in counting or delivering to deceased the $840. Some evidence was introduced also which tends to show that this witness made contradictory statements in the Probate and Circuit courts as to what he saw and heard of the transaction while the persons concerned were in his office. No evidence was introduced which tends to show what disposition Strohmeier made of the $840 which it is said he received for the note. This money does not appear to have been deposited in any one of the three banks in which he had accounts. Further than that, if, as Kleinau and Shulman would have us believe, he borrowed the money for the purpose of buying whiskey, it is a strange circumstance that neither by reference to the bank withdrawals nor any other evidence in the record is anything shown to establish the fact that Strohmeier did purchase whiskey at or about the time he is said to have received the $840 from Willms.

The character of the testimony introduced on behalf of claimant casts somewhat of a cloud upon the genuineness of the transaction alleged to have taken place in the attorney's office. But aside from this the record contains evidence which in our opinion would have warranted a verdict and judgment in favor of the defendant.

Two expert handwriting witnesses testified that in their opinion the alleged signature to the note was not the genuine signature of Strohmeier. The opinion of these witnesses

convenience, it is a very fair argument that their presence there is accounted for by the fact that whatever the nature of the transaction may have been, they were desirous of having the aid of counsel in executing it. Notwithstanding this, the attorney appears to have paid only very casual attention to what transpired in his office. He did not draw the note in question nor did he attend to its execution; nor did he take any part in counting or delivering to deceased the $840. Some evidence was introduced also which tends to show that this witness made contradictory statements in the Probate and Circuit courts as to what he saw and heard of the transaction while the persons concerned were in his office. No evidence was introduced which tends to show what disposition Strohmeier made of the $840 which it is said he received for the note. This money does not appear to have been deposited in any one of the three banks in which he had accounts. Further than that, if, as Kleinau and Kalman would have us believe, he borrowed the money for the purpose of buying property, it is a strange circumstance that neither by reference to the bank withdrawals nor any other evidence in the case is anything shown to establish the fact that Strohmeier did purchase property at or about the time he is said to have received the $840 from Kleinau.

The foregoing recital of the testimony introduced on behalf of claimant casts somewhat of a cloud upon the genuineness of the transaction alleged to have taken place in the attorney's office. But aside from all this the record contains evidence which in our opinion would have warranted a verdict and judgment in favor of the defendant.

Two expert handwriting witnesses testified that in their opinion the alleged signature to the note was not the genuine signature of Strohmeier. The opinion of these witnesses

was based upon a comparison made by them between several genuine signatures of deceased, admitted in evidence for purposes other than the comparison made. All of these admittedly genuine signatures show a definite and easily noted difference between them and the signature on the note, and the testimony of these witnesses is of such character that we are led to believe that they testified truthfully; that they were not mistaken when they gave it as their opinion that the note was signed by a person other than the one who had signed the admitted documents which bore the genuine signature of deceased. Certain characteristics of the genuine signatures appear to be wholly lacking in the signature to the note.

At the request of the plaintiff the court gave the jury the instruction following:

> "The jury are instructed that if the jury believe from the evidence that William Strohmeier in his lifetime executed the note presented as Plaintiff's Exhibit 1, then the jury will find the issues for the claimant and will assess his damages at the amount of the note with interest thereon at the rate of 6 per cent per annum from the date of its execution."

This instruction directed a verdict in favor of the plaintiff if the jury believed that Strohmeier had executed the note.

While it is true that the defendant denied the execution of the note by Strohmeier and that fact was the principal matter in controversy between the parties on the trial, it was incumbent, nevertheless, upon the plaintiff to prove not only the genuineness of the signature, but also that the note was given for a valuable consideration. The evidence offered by the plaintiff touching the matter of the consideration was quite as unreliable as that admitted to prove the execution of the note, and it cannot be held, in view of the character of the evidence, as indicated above, that the alleged consideration for the note

indicated above. But the alleged consideration for the note it cannot be held, in view of the character of the evidence, as reliable as that admitted to prove the execution of the note, and fill tonching the matter of the consideration was quite as unfor a valuable consideration. The evidence offered by the plaintiff to establish the signature, but also that the note was given inasmuch as the plaintiff to prove not only the matter in controversy between the parties on the trial, it was execution of the note by Stromwater and that fact was the principal note.

While it is true that the defendant denied the execution of the note by Stromwater, upon the plaintiff's evidence the jury believed that Stromwater executed the note in question, and this instruction directed a verdict in favor of the plaintiff if the jury believed that Stromwater had executed the note.

> "This instruction directed a verdict in favor of the plaintiff if the jury believed that Stromwater had executed the note. The jury were instructed that if the jury believe from the evidence that Willie Stromwater in his lifetime executed the note referred to in plaintiff's exhibit 1, then the jury will find the issues for the plaintiff and will assess his damages at the amount of the note with interest thereon at the rate of 6 per cent per annum from the date of its execution."

Jury the instruction following:

At the request of the plaintiff the court gave the

to the note.

pearing signature shown to be wholly immaterial in the signature

then the comparison made. All of these admittedly genuine signatures show a definite and quite noted difference between them and the signatures on the note, and the testimony of those witnesses is of such character that we are led to believe that they testified truthfully; that they were not mistaken when they have it as their opinion that the note was signed by a person other than the one who had signed the admitted documents which bore the genuine signature of deceased. Certain characteristics of the

was a fact admitted by defendant upon the trial. The giving of this instruction was error.

The judgment of the Circuit court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

McSurely and Matchett, JJ., concur.

was a fact admitted by defendant upon the trial. The giving of this instruction was error.

The judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Mosbarger and Watkins, J.J., concur.

FINDING OF FACT.

We find as a fact in the case that the promissory note in question was not executed by deceased, William Strohmeier.

We find as a first approximation that the pressure

Note in question was not answered by document. William Stroemeier.

135 - 26793

FRANK VOGT,
Appellee,

vs.

WILLIAM WALTKING, Executor of the Last Will and Testament of WILLIAM STROHMEIER, Deceased,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

223 I.A. 632[4]

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Judgment was entered in the Circuit court of Cook County on appeal from an order of the Probate court of Cook County disallowing a claim of Frank Vogt against defendant. The judgment in the Circuit court entered upon a verdict of a jury was in favor of the claimant, Vogt, for the sum of $3600. Defendant appeals to this court.

It is contended on behalf of defendant that the evidence introduced on the trial does not sustain the verdict and judgment and that the court erred in giving to the jury the instruction following:

> "The jury are instructed that if they believe from the evidence that William Strohmeier in his lifetime received the sum of $3,600 from the claimant, Frank Vogt, and that the same has not been repaid, then it is the duty of the jury to find the issues for the claimant and to assess the claimant's damages at the sum of $3600."

The evidence shows that William Strohmeier, deceased, many years prior to his death on July 15, 1919, operated a saloon at No. 932 West Lake street, Chicago; that May 15, 1919, he had on deposit in banks in Chicago to his credit the sum of about $21,000 and was possessed of other property of value consisting of liberty bonds, real estate and judgment notes; that he maintained a savings account in two of the banks and a checking account in the Market Trust & Savings Bank. In the month of May,

138 - 20793

YORK VOCT.

Appellee,

vs.

VIRGINIA WALTKING, Executor of
the last will and testament of
VIRGIN STRONGSTRING, deceased.
Appellant.

SPECIAL 6327

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE JUSTICE DOGA

DELIVERED THE OPINION OF THE COURT.

Judgment was entered in the Circuit Court of Cook County on appeal from an order of the Probate Court of Cook County dismissing a claim of Mark Vest against decedent. The judgment in the Circuit Court entered upon a verdict of a jury was in favor of the claimant. Vest, for the sum of $30 ". Wilkinson appeals to this court.

It is contended on behalf of defendant that the evidence introduced on the [illegible] of proving the validity and that the court erred [illegible] in giving the instruction following.

The jury [illegible] that if the evidence [illegible] the sum of $2,8[illegible] from [illegible], the said [illegible] and that the [illegible] of the jury to find the issues [illegible] and to [illegible] the claimant's damages at the sum of $20[illegible]."

The [illegible] decreased, [illegible] years prior to the 30 or July 12, 1[illegible] Swanson & Wilson at No. 922 West Lake street, [illegible] died on [illegible], 1[illegible], he had on deposit in [illegible] to his credit [illegible] of about $27,000 and was possessed of other [illegible] valuable contracts of library books, real estate and [illegible] a maintained a banking account in the [illegible]. [illegible] of [illegible],

1919, he made ten deposits and drew thirteen checks on this latter account. Sometime in the year 1917 Strohmeier sold his saloon to the claimant, Vogt, who operated the business until April, 1919, when it was again taken over by Strohmeier; both Strohmeier and Vogt occupied rooms above the saloon.

Evidence introduced for the claimant tends to show that May 5, 1919, Strohmeier executed a paper which in words and figures is as follows:

"I. O. U. $3,600.
William Strohmeier."

The evidence shows that Strohmeier was a business man of some experience; that he was in possession of ten judgment promissory notes at the time of his death and had for years transacted business with banks in Chicago. The paper which contains the alleged promise of Strohmeier was, when considered in connection with the apparent experience of both the claimant and Strohmeier, a most unusual document. It is not more than two inches in length and less than an inch in width. Just why such an important transaction should be expressed in this manner is one of the unusual questions in the case; though said to have been executed by a business man it bears no date, nor was any time fixed therein for the payment of the sum of $3,600, in which amount it is said Strohmeier, by his execution of the instrument, became indebted to claimant. Another circumstance in connection with the matter is that one Willms, who testified for complainant, is the same person who filed a claim against Strohmeier's estate and who obtained a judgment in the Circuit court on a claim for $840.00, which judgment was reversed by this court at the present term. (See Willms, Claimant, vs. Waltking, Executor, etc., No. 26792, not yet reported.) Willms testified that Strohmeier came to his, Willms', rooming house and said "there was going to be some transaction of loaning

1919, he made ten deposits and drew thirteen checks on this latter account. Sometime in the year 1917 Strohmeier sold his saloon to the claimant, Vogt, who conducted the business until April, 1919, when it was again taken over by Strohmeier; both Strohmeier and Vogt occupied rooms above the saloon.

Evidence introduced for the claimant tends to show that May 5, 1917, Strohmeier executed a paper which in words and figures is as follows:

"I. O. U. $5,000.
William Strohmeier."

The evidence shows that Strohmeier was a business man of some experience; that he was in possession of two judgment promissory notes at the time of his death and had for years transacted business with banks in Chicago. The paper which contains the alleged promise of Strohmeier was, when considered in connection with the apparent experience of both the claimant and Strohmeier, a most unusual document. It is not more than two inches in length and less than an inch in width. Just why such an important transaction should be expressed in this manner is one of the unusual questions in the case; though said to have been executed by a cautious man it bears no date, nor was any time fixed therein for the payment of the sum of $5,000, and for what account it is said Strohmeier, by his execution of the instrument, became indebted to claimant. Another circumstance in connection with the matter is that one Williams, who testified for claimant, is the same person who filed a claim against Strohmeier's estate and who obtained a judgment in the Circuit court upon claim for $600.00, which judgment was reversed by this court at the present term. (See *Williams, Claimant, vs. Wilkins, Executor, etc.*, No. 24790, not yet reported.) Williams testified that Strohmeier came to his, Williams', rooming house and said "there was going to be some transaction of loaning

money" in Strohmeier's place of business that morning; that he, Willms, went to Strohmeier's saloon, where he found one Ritter and claimant Vogt. Ritter testified that Strohmeier had informed him on the preceding day that he was going to take over the saloon from Vogt, who was going to Iowa; this, notwithstanding the fact that the same witness also testified that Vogt had surrendered the saloon to Strohmeier in April, 1919. This witness further testified that when he first saw the paper in question it was about four inches long and two and one-half inches wide; that it was not lined; that it was a regular blank piece of paper and there were no lines on it; that when he first saw the paper Strohmeier had taken it off his desk; that he, the witness, "heard him cut a piece, quick, like that, sounding like a cut with a pair of shears"; that Strohmeier then gave the paper to Vogt, who wrote on it the letters and figures "I. O. U. $3,600"; that Vogt gave the paper to Strohmeier, who then signed it; that after the signing Strohmeier took a pair of shears and trimmed it down; "I saw him use the shears;" that a lawyer, Schulman, later placed the figures "5-5-19" on the back of the paper. The testimony of this witness was weakened on cross-examination. Notwithstanding his statement that in the first instance the writing was made on a piece of unlined white paper, he admitted on cross-examination that it contained lines. While he testified he saw Strohmeier sign the instrument he admitted that he had stated at an earlier hearing in the Probate court that he was unable to swear that the paper in evidence was the one he saw Strohmeier sign, and that in answer to a question whether he had seen Strohmeier sign the paper, he had answered in the Probate court, "Well, now, I wouldn't say that. I don't believe that is his signature. I don't think that. That ain't the

note I seen Strohmeier sign. It ain't shaped that way." The testimony of this witness, as developed upon cross-examination, is, to say the least, not impressive. Willms testified that after he entered the saloon on the day in question Strohmeier gave him a blue steel revolver and said to him "to put it in my pocket and stand over him; that he was going to borrow some money from Frank Vogt;" that the witness took the revolver and stood guard over the persons engaged in the transaction; that Vogt took four or five packages of paper money from the safe which were counted by Strohmeier, who then placed the money in a paper shoe box and set it back underneath the bar; that following this Strohmeier reached into a case and brought out a piece of paper about three inches wide and five or six inches long which he cut down with a sheare both before and after it was signed; that Strohmeier then said to the witness, "Now, Henry, I am going to take this upstairs and you follow me upstairs." This witness further testified that he talked with Strohmeier a few days before he died, at which time Strohmeier said that he was going to Michigan to try to regain his health, then he was going to Dubuque, Iowa, to pay Frank Vogt back that money that he loaned from him. Willms testified in the Circuit court that after the transaction he followed Strohmeier upstairs and "saw him safely in his room." Notwithstanding this detailed information given to the jury in the Circuit court, in the Probate court he in effect denied this statement, by saying, "I followed him as far as the door and he went upstairs by himself."

Inferences might reasonably be drawn from the testimony of the persons in the saloon at the time of the alleged transaction which would militate against the claim made by Vogt. Some evidence was admitted to the effect that Strohmeier intended to purchase whiskey with the borrowed money. Proof to

safe I seen Stromeyer sign. It ain't was at that time." The testimony of this witness, as developed upon cross-examination, is, to say the least, not impressive. Wilms testified that after he entered the saloon on the day in question Stromeyer gave him a blue steel revolver and said to him "to put it in my pocket and stand over him; that he was going to borrow some money from Frank Vogt;" that the witness took the revolver and stood guard over the persons engaged in the transaction; that Vogt took four or five packages of paper money from the safe which were counted by Stromeyer, who then placed the money in a paper shoe box and put it back underneath the bar; that following this Stromeyer reached into a case and brought out a piece of paper about three inches wide and five or six inches long [illegible] with a [illegible] both before and after it was signed; that Stromeyer then said to the witness, "Yes, [illegible], I am going to take this paper and you follow me [illegible]." This witness further testified that he talked with Stromeyer a few days before [illegible], at which time Stromeyer said [illegible] to try to regain his health, [illegible], to pay Frank Vogt back that money [illegible] loaned [illegible]. [illegible] testified in the Circuit court that after the transaction he followed Stromeyer upstairs and [illegible]." Notwithstanding this detailed information given to the jury in the circuit court, in the [illegible] in effect [illegible], "I followed [illegible] sold."

[illegible] the testimony of the persons [illegible] the time [illegible] transaction [illegible] Vogt. Some evidence was admitted to the effect that Stromeyer attempted to purchase whiskey [illegible].

corroborate this testimony, however, is significantly lacking in the record. No sufficient reason is shown why Strohmeier should borrow this large sum of money when he had at his disposal $21,000 in cash deposited in Chicago banks. While the evidence shows that he had many transactions with these banks within a few months preceding his death, nothing is shown thereby or by his accounts in the banks which tends in the slightest degree to prove that he had received $3,600 on May 5, 1918, or that he had thereafter expended this or a similar sum for whiskey or for any other purpose. One witness testified that after the transaction Strohmeier said that he was going to buy Liberty bonds. Liberty bonds of the face value of $2100.00 only were found in his effects after his death. No evidence was offered tending to show how deceased disposed of the money. Certain rent receipts were introduced in evidence, and from inspection of them and the paper in question support is found for the argument that the instrument with Strohmeier's genuine signature was in fact cut from a rent receipt received by Vogt for rents paid by him to Strohmeier, and that the letters "I. O. U." and the figures "$3,600" were written above the signature.

Other matters might be indicated which tend to disprove the testimony of claimant's witness. It will be sufficient, however, in this connection to say that it is our opinion that the weight of the evidence in the case does not support claimant's claim, and that being so, it was incumbent upon the trial court to instruct the jury accurately as to the law applicable to the case. The instruction quoted above is faulty in that it says that if the jury believe from the evidence that Storhmeier in his lifetime received the sum of $3600 from the claimant, Frank Vogt, and had not repaid it, then the jury were to find for the claimant. This instruction is misleading. It tended to divert the minds of the jury

from the real issue of fact in the case, which was whether claimant and others had conspired to defraud deceased's estate by fabricating with the aid of Strohmeier's genuine signature a claim against the estate. There is evidence in the record tending to show that Vogt had paid various sums of money to Strohmeier which he, Strohmeier, did not and was not required to repay; and while in other circumstances the giving of the instruction might not be erroneous, we think the attention of the jury ought to have been directed to the only important controversy of fact in the case, namely, whether the paper in question was actually delivered by Storhmeier to claimant, and whether he, Strohmeier, had received a consideration therefor. If it can be said that the I. O. U. was written over Strohmeier's name without his knowledge or consent, the case of the claimant fails irrespective of whether the claimant had ever made other loans or payments to deceased that had not been repaid.

The judgment of the Circuit court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

from the real issue of fact in the case, which was whether claimant and others had conspired to defraud decedent's estate by fabricating with the aid of Strohmeier's genuine signature a claim against the estate. There is evidence in the record tending to show that Vogt had paid various sums of money to Strohmeier which D. Strohmeier, did not and was not required to remit; and while in other circumstances the falsity of the instruction might not be erroneous, we think the attention of the jury ought to have been directed to the only important controversy of fact in the case, namely, whether the power in question was actually delivered by Strohmeier to claimant, and whether he, Strohmeier, had received a consideration therefor. If it can be said that the U. S. was misled over Strohmeier's name without his knowledge or consent, the case of the claimant fails irrespective of whether the signature had ever made other issue or pretended to deceased that had not been imposed.

The judgment of the Circuit court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

Kennedy and Watkins, JJ., concur.

146 - 26804

SCHULHOF DISTRIBUTING CO., a Corporation,
Appellant,

vs.

THOMAS BIGGINS,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 633

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago entered on a verdict of a jury in favor of the defendant for $1000 on a set-off filed by defendant to plaintiff's statement of claim, in which plaintiff alleged that defendant was indebted to it for his breach of a contract to purchase fifty barrels of whiskey or fifty whiskey certificates.

There is a direct contradiction in the evidence as to the terms of the contract sued upon. The plaintiff insists that the defendant had agreed to purchase of plaintiff whiskey certificates, while the defendant asserts that the agreement, which was oral, was for the purchase by defendant of fifty barrels of whiskey. It is admitted that $1000 was paid to or deposited with plaintiff by defendant at the time the agreement was entered into.

Evidence offered by plaintiff tends to prove that the contract provided for the sale of whiskey certificates and not for barrels of whiskey. On the other hand, defendant introduced proof that he had agreed to purchase fifty barrels of whiskey to be delivered to him in quantities as ordered by him from time to time as the needs of his business required.

Defendant's evidence tends to show that no part of

SCHUYLER DISTRIBUTING CO.,
a Corporation,
Appellant,

vs.

THOMAS MIDDING,
Appellee.

APPEAL FROM SUPERIOR COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MAGRUDER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal
court of Chicago entered on a verdict of a jury in favor of the
defendant for $1000 on a set-off filed by defendant to plaintiff's
statement of claim. In which plaintiff alleged that defendant was
indebted to it for the breach of a contract to purchase fifty
barrels of whiskey at fifty dollars per barrel.

There is a direct contradiction in the evidence as
to the terms of the contract upon which plaintiff insists
that the defendant had agreed to purchase of plaintiff whiskey
certificates, while the defendant asserts that the agreement, which
was oral, was for the purchase by defendant of fifty barrels of
whiskey. It is admitted that I C was paid to on defendant with
plaintiff by defendant at the time he entered into
contracts differed by plaintiff as it is claim that
the contract provide for the sale of whiskey certificates
not for barrels of whiskey. On the other hand, defendant insists
that plaintiff by the terms of the contract was to deliver to
defendant proof spirit in bond subject to purchaser's right of
whiskey to be drawn in quantities as ordered by him
from time to time as the needs of his business required.
Defendant's evidence tends to show that no part of

the fifty barrels of whiskey which he says he contracted for was delivered to or offered to be delivered to him.

What constituted the subject matter of the contract was a sharply contested question of fact in the trial court. The record contains evidence which, if believed by the jury, would warrant a finding that plaintiff had orally agreed to deliver fifty barrels of whiskey to the defendant as ordered by him and as the needs of his business required, and that after making the contract plaintiff was either unable or unwilling to comply with its terms. While the evidence as to the terms of the contract between the parties is contradictory, we are unable to hold that it does not preponderate in favor of the contention of defendant. Two witnesses testified upon each side. A witness for plaintiff testified that plaintiff's representative had on several occasions after the making of the agreement requested defendant to pay the balance due on the contract so that plaintiff could deliver to defendant whiskey certificates, which plaintiff insists constituted the subject matter of the contract. This testimony is, in effect, contradicted by Biggins, defendant. In an amended statement of claim, however, it appears that the plaintiff in one count thereof directly charged that defendant had agreed to purchase of plaintiff fifty barrels of whiskey, and this allegation harmonizes with the position taken by defendant.

At the beginning of the trial plaintiff made a motion for non-suit, which motion was renewed at the close of all the evidence. These motions were denied and plaintiff asserts that this was error.

Section 30 of the Municipal Court act provides that:

> "Every person desirous of suffering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its finding."

It is insisted that the phrase "every person" is broad enough to include the plaintiff, notwithstanding the fact that the record shows that at the time the motions were made defendant had filed his statement of set-off and was insisting upon a judgment thereon in his favor. Section 30 of the Municipal Court act is substantially the same as Section 70 of the Practice Act. Section 48 of the Practice Act, however, is as follows:

> "When such plea or notice of set-off shall have been interposed the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court."

While the substance of Section 48 does not appear to have been included in the Municipal Court act, the Municipal court of Chicago being a court of record, it is properly applicable to practice in that court. Section 30 of the Municipal Court act is not repugnant to Section 48 of the Practice act, and it is now a settled matter that rules of practice provided for by the Practice act are applicable to proceedings in the Municipal court except where it appears that statutes relating specifically to practice in the Municipal court are inconsistent with the provisions of the Practice act. The trial court did not err in denying the motion for a non-suit.

June 7, 1919, plaintiff mailed a letter to defendant, a copy of which was offered in evidence by plaintiff. The court sustained an objection to its introduction. Plaintiff's brief recites that the letter was offered in evidence for the purpose of showing that the plaintiff was at all times ready, able and willing to carry out its contract and also "for the purpose of showing notice to the defendant that unless the balance of the purchase price was paid within a time specified plaintiff would be compelled to sell the certificates in the open market," etc. While it may

It is insisted that the phrase "every person" is broad enough to include the plaintiff, notwithstanding the fact that the record shows that at the time the motions were made defendant had filed-his statement of set-off and was insisting upon a judgment thereon in his favor. Section 30 of the Municipal Court act is substantially the same as Section 70 of the Practice Act. Section 48 of the Practice Act, however, is as follows:

> "When such plea or notice of set-off shall have been interposed the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court."

While the insistence of Section 48 does not appear to have been included in the Municipal Court act, the Municipal court of Chicago being a court of record, it is properly applicable to practice in that court. Section 31 of the Municipal Court act is not repugnant to Section 48 of the Practice act, and it is now a settled matter that rules of practice obtaining for by the Practice act are applicable to proceedings in the Municipal court except where it appears that statutes relating specifically to practice in the Municipal court are inconsistent with the provisions of Practice act. The trial court did not err in denying the motion for a non-suit.

June 7, 191 , Plaintiff retund a letter to defendant, a copy of which was offered in evidence by plaintiff. The court sustained an objection to its introduction. Plaintiff's brief recites that the letter was offered in evidence for the purpose of showing that the plaintiff was at all times ready, able and willing to carry out his contract and also "for the purpose of showing in determining the question of damages." Write it may to sell the certificates in the open market," etc. The price was paid within a time specified plaintiff would be compelling notice to the defendant. Act unless the balance of the purchase

It is our opinion also that the trial court had jurisdiction to enter a judgment in favor of the defendant, as his claim grew directly out of the contract relied upon by plaintiff for a recovery against defendant.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McCurely and Matchett, JJ., concur.

It is not obligatory that the first count and Inter-
rogation be taken a judgment in favor of the defendant, as this
pleading does already end at the counsel entered upon by plain-
tiff (or a summary judgment thereof).

The Division of the Court may waive in writing.

be true, as urged, that a part of the letter was admissible for the purpose of showing notice to the defendant, it was inadmissible for the other purposes stated. The letter was largely made up of self-serving statements made by plaintiff, which the jury would have no right to consider. No error was committed in refusing to admit the letter in evidence.

A last amended affidavit offered by plaintiff on its motion for a continuance, which had already been denied, was properly excluded when offered as evidence on the trial. Counsel for defendant had not consented to its admission.

The court directed the jury to find the issues against the plaintiff on his claim against defendant. This instruction was correct because plaintiff's evidence did not show that he had sustained any damages by the alleged breach of the contract by defendant.

As hereinbefore stated, defendant's evidence tended to establish that the contract was for whiskey to be delivered as the exigencies of defendant's business would require. There is some evidence which tends to prove that the defendant demanded five barrels of whiskey on the contract, which plaintiff refused to deliver. Subsequently the Prohibition Amendment to the United States Constitution was adopted and prohibitory laws were passed by the United States Congress and also by the Legislature of the State of Illinois, which rendered it legally impossible to carry out the terms of the contract. The subsequently enacted laws caused a total failure of the consideration for defendant's promises and he was therefore entitled to recover back the deposit made by him on the contract.

12 - 26156

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

RICHARD BURKE,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

223 I.A. 633

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty by a jury upon information filed charging that he was in violation of section 270, chapter 38, of the Revised Statutes, commonly called the Vagrancy Statute. Judgment having been entered on the verdict, he asks this court to reverse.

The information charged that defendant was, on January 6, 1920, in Chicago, an idle and dissolute person, habitually neglectful of his employment, etc., following the language of the statute. The prosecution introduced evidence that defendant was arrested on the night of January 4, 1920, about 10:30, in company with two other men, one of whom, a police officer said, had been previously arrested. Defendant claimed to be employed by the Janitors' Union and introduced evidence tending to support this.

There is some uncertainty as to just what issue was presented to the jury, for upon motion to quash the information the trial court said the first count would be quashed, but not the second, and the jury was instructed that portions of the statute were not applicable to this case and that the state was confined to the charge that the defendant was a well known thief and one who loiters around public thoroughfares. This was upon the erroneous assumption that the information was composed of various counts charging different crimes. In People v. Klein, 292 Ill.

RICHARD KEMP,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

} ERROR TO CRIMINAL COURT OF CHICAGO.

2 2 3 I.A. 6 3 3

MR. JUSTICE MORGANTHAU DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty by a jury upon information filed charging that he was in violation of section 270, chapter 38, of the revised Statutes, commonly called the Vagrancy Statute. Judgment having been entered on the verdict, he sues this court to reverse.

The information charged that defendant was, on January 6, 1920, in Chicago, a idle and disorderly person, habitually neglectful of his employment, etc., following the business of the aforesaid. The prosecution introduced evidence that defendant was arrested on the night of January 4, 1920, about 10:30, in company with two other men, one of whom, a police officer said, had been previously arrested. Defendant claims - to be employed by the Teamsters' Union was introduced relating to employer this, presented to the jury, for upon motion to quash the information the trial court held the first count could be quashed, but not the second, and the jury as instructed that portions of the statute were not applicable to this case. It is that the motion was overruled to the charge that the defendant was a well known thief and one who lingers around [illegible] too. It is now upon the argument that the information sets forth counts charging different crimes. People v. Hale, 32 Ill. [illegible]

420, it was held that such an information contained only one charge, namely, that defendant was a vagabond and that the various allegations tending to bring him within the definition of that character amount to no more than a single charge.

Police officers were permitted to testify not only as to other arrests of defendant, but also as to the arrest of other people, very slightly if at all, connected with defendant. In the Klein case, supra, the admission of similar testimony was held to be prejudicial.

A witness was examined and permitted to testify concerning the character of the neighborhood where defendant was arrested; that many automobile concerns were there with tires and automobile accessories; all calculated to impress the jury with the belief or suspicion that defendant was in the neighborhood with criminal design upon these shops and their contents. Such evidence was wholly improper.

We see no reason why the instruction as to circumstantial evidence in criminal cases should have been given. While the instruction might be given in a proper case, it had no application to the present trial. It was incumbent upon the prosecution to prove the charge made in the information by evidence of facts. Circumstances merely giving rise to suspicion were not enough.

We are following what is said in the opinion of the Supreme court in the Klein case, supra, and under its authority we shall reverse the judgment and remand the cause.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

34 - 26404

CHARLES KAPLAN, Assignee of the Estate of John M. Tananevicz, Bankrupt,
Appellee,

vs.

ANTON MARTINKUS and PETER YKCUIS,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 633

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendants for $1336.75.

Plaintiff's claim was based upon a promissory note, and December 5, 1919, judgment was entered under a power of attorney to confess judgment. December 22 a petition was filed asking that defendants be given leave to defend, which was allowed, the judgment to stand as security. Affidavits of defense were filed and also a notice of set-off. Thereafter trial was had by the court, resulting in a finding, entered March 22, 1920, that there was due from defendants to plaintiff $1336.75, or the amount of the judgment entered December 5, 1919. An appeal was prayed from this final judgment on condition that an appeal bond be filed within twenty days, a bill of exceptions in ninety days. The appeal bond was duly filed.

There is no bill of exceptions in the record, hence we cannot consider objections and arguments predicated upon evidence presented and rulings made at the trial. We must presume there was sufficient competent evidence to support the judgment.

August 23, 1920, defendant Martinkus filed a written motion supported by affidavit, again asking that the judgment

CHARLES KAPLAN, Assignee of the
Estate of John K. Tumasevich,
Bankrupt,

Appellee,

vs.

ANTON MARTINKUS and ESTHER KRUHIS,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORSELL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendants for $1336.75.

Plaintiff's claim was based upon a promissory note, and December 5, 1910, judgment was entered under a power of attorney to confess judgment. December 22 a petition was filed asking that defendants be given leave to defend, which was allowed, the judgment to stand as security. Affidavits of defense were filed and also a notice of set-off. Thereafter trial was had by the court, resulting in a finding, entered March 22, 1920, that there was due from defendants to plaintiff $1336.75, or the amount of the judgment entered December 5, 1910. An appeal was prayed from the final judgment on condition that an appeal bond be filed within twenty days. A bill of exceptions in ninety days. The appeal bond was duly filed.

There is no bill of exceptions in the record, hence we cannot consider objections and arguments predicated upon evidence presented in matters made at the trial. We must presume there was sufficient competent evidence to support the judgment. August 25, 1920, defendants' attorneys filed a written motion supported by affidavit, again asking that the judgment

be vacated and defendants permitted to defend on the ground of what apparently is claimed to be newly discovered evidence. This motion was overruled. Defendants have argued here as if this latter order was before us on appeal, but this is a mistaken view of the matter. When defendants perfected their appeal from the judgment order of March 22, 1920, by filing their appeal bond, in contemplation of law the case was pending in the Appellate court, and the trial court had lost jurisdiction. Merrifield v. Cottage Piano Co., 238 Ill., 526. The trial court therefore could not properly take any action upon the petition, and whatever action might have been taken is not properly before us.

The argument, that because there is no bill of exceptions before us there is no evidence to support the judgment, is probably based upon a confusion as to the practice in chancery and the different practice in a suit at law, which this is. We see no reason to disturb the judgment.

Plaintiff asks for statutory damages, claiming that this appeal is taken for delay, but we are not inclined to allow this.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

be vacated and defendants permitted to defend on the ground of what apparently is claimed to be newly discovered evidence. This motion was overruled. Defendants have argued here as if this latter order was before us on appeal, but this is a mistaken view of the matter. When defendants perfected their appeal from the judgment order of March 22, 1940, by filing their appeal bond, in contemplation of law the case was pending in the Appellate court and the trial court had lost jurisdiction. Northfield v. Cottage Plano Co., 238 Ill., 526. The trial court therefore could not properly take any action upon the petition, and whatever action might have been taken is not properly before us.

The argument, that because there is no bill of exceptions before us there is no evidence to support the judgment, is probably based upon a confusion as to the practice in chancery and the different practice in a suit at law, which this is. We see no reason to disturb the judgment.

[illegible] make for [illegible], finding that this appeal is taken for delay, but we are not inclined to allow this.

The judgment is affirmed.

[illegible].

Never, J., [illegible] and Intermet, J., dissenting.

92 - 26747

WILLIAM H. STOLTE,
Appellee,

vs.

BENNY BAKER,
Appellant.

APPEAL FROM CITY COURT OF
CHICAGO HEIGHTS.

223 I.A. 334

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff in this case is William H. Stolte and defendant is Benny Baker, but in the abstracts and briefs these names are reversed in the title, contrary to the statute, which requires that cases shall be entitled in this court as they were in the trial court.

Plaintiff Stolte's automobile came into collision with a truck owned by defendant, Baker. Plaintiff brought suit to recover damages to his automobile, and upon trial by a jury had a verdict for $233.55. Judgment was entered thereon, from which defendant appeals.

The accident happened in the City of Chicago Heights, at the intersection of Otto boulevard, a north and south street, and Sixteenth street, which runs east and west. There is some dispute in the testimony, but the jury properly could believe that the automobile of plaintiff, driven by his daughter, an adult, was going north on Otto boulevard on the east or right side of the street and had entered the intersection and was about in the centre of Sixteenth street when the truck belonging to defendant came from the west going east on Sixteenth street, driving fast on the north or wrong side of the street; it turned further to the north in an attempt to pass in front of plaintiff's automobile. In swinging the truck around towards the northeast its rear right fender struck the front of plaintiff's automobile. The jury was justified in con-

WILLIAM H. STOLTZ,

Appellee,

vs.

BENNY BAKER,

Appellant.

APPEAL FROM CITY COURT OF

CHICAGO & IGNEN.

MR. JUSTICE MCGURKEY DELIVERED THE OPINION OF THE COURT.

Plaintiff in this cause is William H. Stoltz and defendant is Benny Baker, but in the abstracts and briefs these names are reversed in the title, contrary to the statute, which requires that cause shall be entitled in this court as they were in the trial court.

Plaintiff Stoltz's automobile came into collision on Fifty-fifth street, between Dearborn and Clark streets, with a truck owned by defendant, Baker. Plaintiff brought suit to recover damages in the sum mentioned, and upon trial by a jury had a verdict for $200.00. Judgment was entered thereon, from which defendant appeals.

The accident happened in the City of Chicago on Wabash avenue, at the intersection of the boulevard system and Fifty-fifth street, and Sixteenth street, which runs east and west. There is some dispute in the testimony, but the jury properly could believe that the automobile of plaintiff, driven by his daughter, an adult, was going north on Dearborn street and had entered the intersection and was about to pass in front of plaintiff's automobile. The jury was justified in concluding that the truck owned by defendant was driven by an employee who was going north on the boulevard or the west or right side of the street; it turned (further to the north in an attempt to pass in front of plaintiff's automobile. The jury was justified in concluding that the truck driver did not sound the horn or give any signal of his approach, and had entered the intersection of Fifty-fifth street when the truck belonging to defendant came from the west point east on Sixteenth street, striking first on the north or front side of the automobile. The force of the collision was such that the automobile was overturned and the plaintiff was thrown out and injured. The testimony of plaintiff and his witnesses tends to show that he was in the exercise of due care and caution for his own safety, and that the collision was caused by the negligence of the driver of the truck. The defendant contends that the verdict is against the manifest weight of the evidence, and that the court erred in refusing to direct a verdict for the defendant. The defendant also contends that the court erred in refusing to give certain instructions requested by him, and in giving certain instructions requested by plaintiff. It is also contended that the damages are excessive. The defendant's contentions are not well taken. The jury was justified in concluding that the truck driver did not sound the horn or give any signal of his approach, and had entered the intersection of Fifty-fifth street when the truck belonging to defendant came from the west point east on Sixteenth street, striking first on the north or front side of the automobile. The force of the collision was such that the automobile was overturned and the plaintiff was thrown out and injured. The testimony of plaintiff and his witnesses tends to show that he was in the exercise of due care and caution for his own safety, and that the collision was caused by the negligence of the driver of the truck. The defendant contends that the verdict is against the manifest weight of the evidence, and that the court erred in refusing to direct a verdict for the defendant. The defendant also contends that the court erred in refusing to give certain instructions requested by him, and in giving certain instructions requested by plaintiff. It is also contended that the damages are excessive. The defendant's contentions are not well taken.

cluding that if defendant had been on the right side of the street he would have passed safely in the rear of plaintiff's automobile, but that being upon the wrong side and attempting to cross in front of the automobile, defendant's driver was guilty of negligence causing the accident.

Defendant claims that plaintiff's driver was guilty of contributory negligence, based upon the evidence tending to show that she had little experience in driving a car; but it does not appear that this alleged inexperience caused the accident. An experienced driver would probably not have acted differently.

Defendant complains of what in the brief is described as instruction "No. 1" given at the request of plaintiff. The brief does not tell us what the instruction is, and on referring to the abstract we do not find any instruction designated as "No. 1." Refusing defendant's offered instructions "Nos. 1 to 8 inclusive," is questioned. This is confusing, for the abstract shows that the court gave defendant's offered instructions Nos. 2 to 14 inclusive. The proper practice is to set out an instruction in the brief and then criticise it. Simply describing it by a number and asserting that it is good or bad is not sufficient. However, examination of defendant's offered instructions which the abstract shows as marked refused, does not convince us that it was prejudicial error to refuse to give them.

As to the rights of respective vehicles at street intersections, we are in accord with what was said in the opinion by Mr. Presiding Justice Thomson in Strelau, Admr. v. C. C. Ry. Co., 218 Ill. App. 630, opinion not published in full. The rule that both parties have equal rights at intersections does not mean that the two vehicles are equally entitled to use the crossing at the same moment. Ordinarily the rule is that the vehicle which reaches or enters the crossing first should have

vehicle which reaches or enters the crossing first should have
crossing at the same moment. Ordinarily the rule is that the
mean that the two vehicles are equally entitled to use the
that both parties have equal rights at intersections." 60 Cor.
Jur. 819 III. App. 69, motion not allowed in full. The rule
by Mr. Presiding Justice Thomson in Literski, supra. C. C. L.
interpretations, we are in accord with what was said in the opinion
was practically error to refuse to give them.

As to the rights of respective vehicles at street
obstruct whose be marked relevant, legal not convince we that it
However, examination of defendant's offered instructions which the
number and asserting that it is good or bad in not sufficient.
in the brief and then criticize it. Simply describing it by a
to 14 inclusive. The proper practice is to set out an instruction
shown that the court gave defendant's offered instructions Nos. 2
8 inclusive," is questioned. This is convincing, for the abstract
"No. 1." Defendant Dale Wentz's offered instructions "No. 1 to
to the abstract we to not find any instruction designated as
brief does not tell us what the instruction is, and on referring
an instruction "No. 1" given at the request of plaintiff. The

Defendant complains of what is the brief is described
An experienced driver would promptly not have acted differently.
does not appear that this alleged inexperience caused the accident.
when that she had little experience in driving a car; but it
of contributory negli- ence, based upon the evidence tending to
of negligence causing the accident.

Defendant claims that plaintiff's driver was guilty
cross in front of the automobile, defendant's driver was guilty
automobile, but that being upon the wrong side and attempting to
street in would have passed safely in the rear of plaintiff's
claiming that it defendant had been on the right side of the

the right of way, but this "does not imply that regardless of the speeds of the respective vehicles or the possibilities as to stopping them or guiding them from the path in which they are approaching the intersection, and other facts that may be involved, the one first reaching or entering upon the intersection may be driven ahead regardless of consequences and relying upon the driver of the other vehicle stopping in time to avoid a collision."

We are content to abide by the verdict of the jury on the facts, and as there was no error upon the trial the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

the right of way, but this does not imply that reservation of the speeds of the responsive vehicles or the possibility on to stopping them or guiding them from the path in which they are proceeding the intersection, and other facts that may be involved. the one first reaching or entering upon the intersection may be driven ahead regardless of consequences and relying upon the driver of the other vehicle stopping in time to avoid a collision."

We are content to abide by the verdict of the jury on the facts, and if there was no error upon the trial the judgment is affirmed.

AFFIRMED.

Dwyer, P. J., and Ketchpel, J., concur.

104 - 26760

HUGHEY MOTOR CAR COMPANY,
a Corporation,
Appellant.

vs.

THATCHER W. HOYT,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

223 I.A. 634

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, the Hughey Motor Car Co., brought suit claiming a balance due of $179.40 for repairs made on the defendant's automobile. Upon trial by the court finding and judgment were for defendant and plaintiff appeals.

There is no dispute as to the character of the repairs or the reasonableness of the charges.

From the evidence the court could properly conclude that in 1917 plaintiff was in the business of selling and repairing Peerless automobiles; that a Mr. Cooley was its agent, vice-president and salesmanager and was also negotiating loans for his company for the purpose of carrying on its business; that in September of that year Cooley proposed to defendant that if he would buy one of their automobiles and would also assist plaintiff in obtaining loans of money from a Mr. Beach, the company would agree to repair and maintain the automobile purchased without charge. This was accepted by defendant, but the agreement was not in writing. Thereafter defendant bought the car, at which time a written order for the Peerless automobile at the agreed price was given by plaintiff through Mr. Cooley, which order contained the words, "This order when accepted by the company shall constitute the entire agreement between the parties." Subsequently defendant assisted plaintiff in obtaining loans for large sums of money amounting to between $25,000 and $50,000 by introducing Mr.

HUDSON MOTOR CAR COMPANY,
a Corporation,
Appellant,

vs.

THADDEUS P. NOVY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McMURRAY DELIVERED THE OPINION OF THE COURT.

Plaintiff, the Hudson Motor Car Co., brought suit claiming a balance due of $192.40 for repairs made on the defendant's automobile. Upon trial by the court finding and judgment were for defendant and plaintiff appeals.

There is no dispute as to the character of the repairs or the reasonableness of the charges.

From the evidence the court could properly conclude that in 1917 plaintiff was in the business of selling and repairing Hudson automobiles; that [illegible], Dooley was the agent, vice-president and salesman for about one year negotiating for his purchase of the automobile and took it to the garage; that in December of that year Dooley undertook to determine that if he would pay one of their automobiles and could give credit plaintiff in obtaining loans of money [illegible], the company would agree to repair and maintain the automobile purchased. It out of the. This was accepted by defendant, but the agreement was not in writing. Thereafter defendant bought the car, at various times written order for the repairs mentioned at the ... was given by plaintiff through Mr. Hofer, which order contained the words, "This order has been accepted [illegible] on [illegible]." Thereafter the entire expense of [illegible] was for labor and materials furnished defendant amounting to between $[illegible] and $[illegible] by plaintiff, [illegible] for labor and [illegible] of which defendant paid $[illegible], leaving a balance due of $192.40 for repairs made on the defendant's automobile. Upon trial by the court finding and judgment were for defendant and plaintiff appeals.

There is no dispute as to the character of the repairs or the reasonableness of the charges.

From the evidence the court could properly conclude that in 1917 plaintiff was in the business of selling and repairing Hudson automobiles; that [illegible], Dooley was the agent, vice-president and salesman for about one year negotiating for his purchase of the automobile and took it to the garage; that in December of that year Dooley undertook to determine that if he would pay one of their automobiles and could give credit plaintiff in obtaining loans of money [illegible], the company would agree to repair and maintain the automobile purchased. It out of the. This was accepted by defendant, but the agreement was not in writing. Thereafter defendant bought the car, at various times written order for the repairs mentioned at the ... was given by plaintiff through Mr. Hofer, which order contained the words, "This order has been accepted [illegible] on [illegible]." Thereafter the entire expense of [illegible] was for labor and materials furnished defendant amounting to between $[illegible] and $[illegible] by plaintiff, [illegible] for labor and [illegible] of which defendant paid $[illegible], leaving a balance due of $192.40 for repairs made on the

Cooley to Mr. C. B. Beach, a money lender, and taking part in the negotiation and consummation of such loans. Subsequently plaintiff wrote to defendant, enclosing a bill for repairs, which defendant showed to Cooley, who said it was a mistake and tore up the bill. Later on plaintiff wrote to defendant asking for remittances, but defendant replied that under the agreement between him and Mr. Cooley with reference to loans, etc., no charges were to be made for repairs.

It was competent to introduce evidence as to the verbal agreement, not for the purpose of altering the writing, but to show the entire agreement. The written order subsequently executed was in part execution of the parol agreement. This is in accordance with the rule that

> "Where the agreement is not reduced to writing but is intended by the parties to rest in parol, the written instrument being subsequently executed in part execution of the parol agreement, and not for the purpose of putting that agreement in writing, it is well settled that an instrument thus executed does not supersede a prior parol agreement." 10 Ruling Case Law, vol. 10, p. 1019.

See also Wigmore on Evidence, vol. 4, section 2430. This rule was followed and applied in Platt v. Aetna Insurance Co., 153 Ill. 113, and cases there cited. In Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88, this exception to the general rule stated in Telluride Power Co. v. Crane Co., 208 Ill. 218, is pointed out.

The finding was justified by the evidence and there is no reason in law to reverse. The judgment will therefore be affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

Cooley to Mr. O. B. Hewon, a money lender, was taking part in the negotiation and conversation of said loans. Subsequently plaintiff wrote to defendants, enclosing a bill for repairs, which defendant endorsed to Cooley, who sent it to a mistake and tore up the bill. Later on plaintiff wrote to inform it ex on for remittances, but defendant replied that under the agreement between him and it. Cooley with reference to loans, etc., no charges were to be made for repairs.

It was competent to introduce evidence as to the verbal agreement, not for the purpose of altering the writing, but to show the entire agreement. The written order was duly executed was in part execution of the parol agreement. This is in accordance with the rule that

> "Where the agreement is not required to be in writing but is reduced to writing, the parties to same in part, the writing being subsequently executed in part execution of the parol agreement, and not for the purpose of entire agreement in writing, it is well settled that contemporaneous thus executed does not supersede prior parol agreement." 10 Cyc. Law, vol. 10, p. 1015.

See also Wig ers on Valda ce, vol. 4, section 243. This rule was followed and applied in Hirsh v. Aetna Insurance Co., 152 Ill. 113, and cases there cited. In Wade & Lane Co. v. Litfredge & Co., 262 Ill. 84, this exception to the general rule stated in Tolfurtde Power Co. v. Crane Co., 208 Ill. 618, is pointed out.

The finding was justified by the evidence and there is no reason in law to reverse. The judgment will therefore be affirmed.

AFFIRMED.

Dever, J., not participating.

110 - 26766

CITY OF CHICAGO,
Appellee,

vs.

WHITT JAMISON,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 542

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with keeping, managing, maintaining and owning a common gambling house in the city of Chicago and upon trial by the court was found guilty and fined $100, as the abstract shows in one place, while in another it says $200. Defendant appeals to this court, but the City does not appear to defend the judgment.

We are of the opinion that the evidence does not support the charge. The police officers saw ten men, including defendant, for a few minutes standing around a pool table on the night in question at a place called the Saratoga Club. Apparently there was gambling with dice. Defendant wore a green apron with a pocket in it. When the police arrived some one not identified pulled the money and the dice with a cane towards defendant, who picked them up, put them in his apron and ran to the toilet room. Defendant denied that he was the keeper of the place, but says that he plays pool there and that the place is a club run by Joe Glenn; that he, defendant, does not run the place but goes up there to visit. Glenn testified that the Saratoga is a social and political club, incorporated, with a membership of 500, that he makes his living running it and is its first vice-president and general manager. He says that gambling was not allowed by the constitution of the club. Other witnesses testify that Glenn was the manager.

CITY OF CHICAGO,
Appellee,

vs.

ORLIN JANISON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

FILED
SEP 17 A. D. 1934

MR. JUSTICE MORSE DELIVERED THE OPINION OF THE COURT.

Defendant was charged with keeping, maintaining and operating a room on appeal to the city of Chicago and upon trial in the court he found guilty and fined $100, as the statute then in force allowed, which he refused to pay and upon trial in the court he found guilty and fined $250. Defendant appeals to this court, but the City does not appear to defend the judgment.

No one of the opinion that the evidence does not support the charge. The police officers saw ten men, including defendant, for a few minutes standing around a pool table on the night in question at a place called the Harbour Club. Apparently there was nothing with them. Defendant were a green apron with a pocket in it. When the police arrived none of the billiard balls were moving and the lights were turned on. As the police left, no one left the room. Defendant denied that he was the keeper of the place, but says that he plays pool there and that the night in question he was the manager.

While the evidence raises a fair suspicion that Jamison was gambling with dice, we do not believe it is sufficiently proven that he kept, managed, maintained and owned the establishment, hence the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

while the evidence raises a fair suspicion that Davison was dealing with dice, we do not believe it is sufficiently proven that he kept, manufactured, switched and caused the establishment, hence the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

119 - 26776

TURE PETERSON,
Appellee,

vs.

JULIUS LINDER et al.
On Appeal of EDWARD J. MISCH and
EMMA MISCH,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

223 I.A. 634[3]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Edward J. Misch and Emma Misch, his wife, from a decree giving the complainant a mechanic's lien for $454.42 on Edward Misch's interest in premises owned by them jointly.

The cause was referred to a master in chancery, who found that March 1, 1917, Edward J. Misch and Emma Misch, his wife, were the owners in fee simple as joint tenants of the premises in question; that Edward J. Misch for himself and as agent for his wife entered into a contract with Julius Linder for the erection of a building upon said premises, and April 1, 1917, Linder contracted with Ture Peterson, the complainant, for the excavating and mason work, for an agreed price; that Peterson completed his contract and that his work enhanced the value of the premises in excess of the subcontract price; that on August 10, 1917, there remained a balance due of $410 with interest; that September 26th complainant served upon Edward J. Misch his mechanic's lien notice, but the master found that it did not appear that this was served upon Emma Misch, although she was in the premises at the time. The master found that complainant complied with all the requirements of the statute to establish a lien against the interest of defendant Edward J. Misch in the premises, and recommended a decree for $454.42, which was accordingly entered. The abstract fails to show

TUCK KETCHESON,

Appellee.

vs.

JAMES LIMMER et al.,
On Appeal of MYRARD J. NIECH and
EDNA NIECH,

Appellants.

APPEAL FROM CHEYENNE COUNTY,

CLOUD COUNTY.

MR. JUSTICE McCARTY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Myrard J. Niech and Edna Niech, his wife, from a decree giving the complainant a mechanic's lien for $484.42 on Myrard Niech's interest in the lots owned by them jointly.

The cause was referred to a master in chancery, who found that March 1, 1917, Myrard J. Niech and Edna Niech, his wife, were the owners in fee simple as joint tenants of Lots five in question; that Myrard J. Niech for himself and as agent for his wife entered into a contract with James Limmer for the erection of a building upon said premises, and that, by said contract, Limmer contracted with Tuck Ketcheson, the complainant, for the excavating and masonry work, for an agreed price; that Ketcheson completed his contract and that his work and the value of the premises in excess of the mortgages; that on August 1, 1917, there remained a balance due of $484 with interest; that September 26th complainant served upon Niech J. Niech his sworn [illegible] but the master found that it did not appear that [illegible] upon Edna Niech, although she was in [illegible] The master found that compliance had [illegible] the owners of [illegible] $484.42, which was accordingly entered. The abstract fails to show

any objections to the master's report or any exceptions thereto, hence all questions of fact must be presumed to be correctly decided by the trial court. Rubendall v. Tarbox, 200 Ill. App. 260.

The principal point urged against the decree is that it awarded the lien against the interest of Edward J. Misch only, and not against the interest of Emma Misch; that as they were owners as joint tenants of the premises, recovery must be had against both or none. The cases cited to support this are not pertinent, as they are actions at law for the recovery of a judgment against the contractor and owner. Section 1 of the Mechanic's Lien Act, chap. 82, provides that

> "This lien shall extent to an estate in fee, for life, for years, or any other estate or any right of redemption, or other interest which such owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire therein."

Section 3 provides that in case the title to lands upon which improvements are made is held by husband and wife jointly, the lien may attach to such lands and improvements "if the improvements be made in pursuance of a contract with both of them or in pursuance of a contract with either of them." Hence the lien might have been found against the interest of both parties; but this is not necessarily in conflict with the first section of the statute, which authorizes a lien against one joint tenant. We are referred to no decision in this state to the contrary, and there is no substantial reason to reverse a decree at the instance of defendants because it awards less to complainant than he might have had. Webber Lumber & Supply Co. v. Erickson, 216 Mass. 81, seems to hold that the lien must be upon the whole land and not upon an undivided interest, where all the joint tenants were erecting the building, but in the later case

joint tenants were erecting the building, but in the latter case the whole land and not upon an undivided interest, there all the lien could attach. 27C Mean. 81, seems to hold that the lien must be upon the entirety. "We are referred to no decision in this state or to the contrary, and there is no substantial reason to create a decree at the instance of defendants because it awards less to contain- ent than he might have had. Kepler Lumber & Fuel Co. v. Strick- son, 27C Mean. 81, seems to hold that the lien must be upon the whole land and not upon an undivided interest, there all the joint tenants were erecting the building, but in the latter case the improvements be made in order to [illegible] contract with both of them or in pursuance of a contract with either of them." Hence the lien might have been found against the interest of both par- ties; but this is not necessarily in conflict with the first sec- tion of the statute, which authorizes a lien against one joint tenant's interest. Subdivision 2 provides that in case the 1 ien to lands upon which improvements are made is held by husband and wife jointly, the lien may attach to such lands and interests in "if the improvements be made in pursuance of a contract with both of them or any other person or corporation acting for them, or subsequently ratified by them."

Section 3 provides that in case the 1 ien to lands

> "This lien shall extend to an estate in fee, for life, for years, or any other estate or any right of redemption, or other interest which such owner may have in the lot or tract of land at the time of making such contract or may subse- quently acquire thereto."

joint tenants, only, &c, provided that

> "This lien act, supra, &c, shall not affect the recovery of a judg- ment against the contractor and owner. Section 1 of the Woodman's Lien Act, supra, &c, provides that

and not against the interest of Emma Kloch; that is they were owners as joint tenants of the premises. Recovery must be had against both or none. The cause cited do support this are not particular, as they are relative at law for the recovery of a judg-

it awarded the lien against the interest of Edward J. Kloch only,

any objections to the master's report or any exceptions thereto, hence all questions of fact must be presumed to be correctly de- cided by the trial court. Redmondall v. Yerkes, 26C Ill. App. 260.

The principal point raised against the decree is that

of Roxbury P. & D. Co. v. Nute and others, 233 Mass., 112, it was held that while one tenant in common cannot encumber the estate of his co-tenant, there was no valid objection to establishing a mechanic's lien on the interest of one tenant in common, although petitioners have proceeded against both owners, alleging that labor and materials were supplied with their consent; that the share of the tenant who makes the contract may be held for the work thus authorized and a lien established against it.

Counsel for defendants contend that Edward J. Misch was not the agent of his wife in this matter. If this is true, it is an additional reason to attach the lien to his interest only.

Furthermore, we do not see how Emma Misch, one of the appellants, can complain because her interest in the premises was not subjected to the lien.

It is not the law under the present statute that, payments having been made to an original contractor before the service of notice from a subcontractor, such notice is ineffectual because made too late. Under the present statute the lien attaches from the date of the contract. Pittsburgh Plate Glass Co. et al. v. Kranss, 213 Ill. App. 315, 291 Ill. 84; Templeton Lime Co. v. Bartling et al., 216 Ill. App. 651. Especially applicable to this case is the opinion and decision in Nielsen v. Enchius, 212 Ill. App. 409.

A further reason for supporting the decree is that the abstract fails to show that any of the points in the argument were made in the trial court.

The decree is proper and it is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

SAMUEL J. MCCARL,
Appellant,
vs.
CLOCK & GUILD CO., a Corporation,
Respondent.

MR. JUSTICE MONTGOMERY DELIVERED THE OPINION OF THE COURT.

exhibited in the show window of defendants' store three or four organdie dresses in combination with hats of the same material, shaped something like a sunshade. There was a sale of one of these combinations to a relative of the plaintiff, and there is force in the suggestion that the buyer made the purchase not to secure the garment but at the instance of the plaintiff, to secure evidence. A former employe of the plaintiff testified by deposition as to having seen a large number of hats on display on the premises and clerks offering them to customers. We are of the opinion that his testimony was properly discredited by the testimony of many other witnesses.

Do these facts amount to a breach of the covenant against the use of the premises for the sale of millinery? Courts will not favor forfeitures, and, to avoid this, a strict construction will be given to the covenant claimed to be breached and the facts claimed to amount to a breach will be scrutinized closely. Hawes v. Favor, 161 Ill., 440. With this in mind, we hold that there was no breach of the covenants in question and hence no ground for forfeiture, and for the following reasons.

It is a close question as to whether these sunshade hats in combination with dresses of the same material could accurately be called millinery. Respective counsel have delved deeply into this interesting subject. We prefer, however, in this instance to accept the opinion of Mr. Rightman, in the millinery business in the adjoining store, who would naturally be keen from self interest to discern any violation of the anti-millinery covenant in question. He testified that he would not consider that outfit millinery. "That is not the subject of millinery. * * In my frank opinion, I would not consider this millinery at all." It is "out of the class of millinery", and

exhibited in the show window of defendants' store three or four organdie dresses in combination with hats of the same material, shaped something like a sunshade. There was a sale of one of these combinations to a relative of the plaintiff, and there is force in the suggestion that the buyer made the purchase not to secure the garment but at the instance of the plaintiff, to secure evidence. A former employe of the plaintiff testified by deposition as to having seen a large number of hats on display on the premises and clerks offering them to customers. We are of the opinion that his testimony was properly discredited by the testimony of many other witnesses.

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It is a close question as to whether organdie sunshade hats in combination with dresses of the same material could accurately be called millinery. Respective counsel have delved deeply into this interesting subject. Our answer, however, in this instance [illegible] the millinery business [illegible] trade, [illegible] be kept from [illegible] any violation of the anti-millinery covenant in question. [illegible] could not consider that outfit millinery. "That is not the subject of millinery. [illegible] In my frank opinion, I would not consider this millinery at all." "It is none of the [illegible] millinery [illegible]

that he examined these hats, and as it did no harm to his business he did not care how many were sold in defendants' store, because he would not call them millinery. The distinction he seemed to make was that millinery means hats sold independently of other garments and not a combination of a summer dress and sunshade sold as one article and not separately. We conclude that the articles exhibited in defendants' store were not millinery within the meaning of the covenant in question.

A sale of one hat is not the sale of millinery. Millinery is a generic term indicating hats in numbers. In this sense of the word millinery was not sold in defendants' premises.

The display of these articles and the sale of one of them did not amount to the use and occupancy of the premises for the sale of millinery. The words "use" and "occupied" imply more than an isolated single instance. They imply habitual and customary use and occupancy of the premises for a certain purpose. These words have been so construed in Westchester Fire Insurance Co. v. Foster, 90 Ill., 121; Grand Lodge A. O. U. W. v. Belcham, 145 Ill., 309; O'Neil v. Sinclair, 153 Ill., 525, and other cases. The premises in question were not used and occupied in the forbidden business.

Other points have been suggested and argued, but the considerations above indicated are sufficient to justify the judgment of the trial court and it is affirmed.

AFFIRMED.

Dever, P. J. and Matchett, J., concur.

that he examined those hats, and as it did no harm to his business he did not care how many were sold in defendants' store, because he would not call them millinery. The distinction he seemed to make was that millinery means hats sold independently of other garments and not a combination of a summer dress and sunshade sold as one article and not separately. We conclude that the articles exhibited in defendants' store were not millinery within the meaning of the covenant in question.

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Other points have been [illegible] and argued, but the considerations above indicated [illegible] the judgment of the trial court [illegible].

[illegible]

Devoy, [illegible], and [illegible], J., concur.

152 - 26811

S. WOSKO, Doing Business as Metropolitan Thread Company,
Appellant,

vs.

JOSEPH H. GOLDNER and WILLIAM H. GILLY, Doing Business as Independent Thread Mills,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 654

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered upon trial by the court in a suit brought by S. Wosko, doing business as Metropolitan Thread Company, against Joseph Goldner and William H. Gilly, doing business as Independent Thread Mills. Appellant's statement in his brief does not disclose what the judgment was, nor does his abstract. These omissions would justify an affirmance. We infer that the court found for defendant.

Plaintiff's brief does not give us sufficient information to arrive at an understanding of what the issues were in the case. From defendants' brief we gather that the suit was brought for the alleged failure to deliver certain goods said to be purchased by plaintiff of defendants. The evidence warranted the trial Judge in finding that in the fall of 1919 plaintiff placed with defendants a series of five orders for different kinds of thread amounting to over $6000. The terms of payment on all orders were cash on the 10th day of each month for goods delivered the preceding month. The bill for January goods, payable February 10th, was not paid by plaintiff, and defendants brought suit therefor, finally compelling payment. Thereafter defendants declined to deliver any more goods to plaintiff except for cash or a certified check, which plaintiff declined to give. Under such circumstances defendants had the right to cancel the contract and to refuse to make further deliveries.

IBS - 20811

B. YOCKO, Doing Business as
Metropolitan Thread Company,
Appellant.

vs.

JOSEPH H. OLDERMAN and EMILY M.
ORLIK, Doing Business as Independent
Thread Mills,
Appellees.

MR. JUSTICE MCSURELY MODIFIED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered upon trial by the court in a suit brought by B. Yocko, doing business as Metropolitan Thread Company, against Joseph Olderman and Emily M. Orlik, doing business as Independent Thread Mills. Appellant's statement in his brief does not disclose what the judge at bar, nor does his abstract. These omissions would justify us affirmance. We infer that the suit found for defendant.

Plaintiff's brief does not give us sufficient information to survive of an understanding of what the issues were in the case. From defendant's brief we infer that it was brought for the alleged [illegible] due to failure certain goods said to be purchased by plaintiff of defendants. The evidence warranted the trial judge in finding that in the fall of 1930 plaintiff leased with defendant a series of five orders for [illegible] Thread Mills of Thread Machine to over 8000. The terms of payment on all orders more than 10th day of each month for which defendant received the preceding month. The bill for January rental, [illegible] January 1st, was not paid by plaintiff, and defendant sent it after [illegible]. [illegible] payment. Thereafter defendant refused to [illegible] to plaintiff except for cash on delivered each, which plaintiff declined to give. Under such circumstances defendant had the right to cancel the contract and to refuse to make further deliveries.

Hess Co. v. Dawson et al., 149 Ill. 138; C. F. Coal Co. v. Whitsett, 278 Ill. 623.

No sufficient reasons are presented showing that plaintiff was entitled to recover, and the judgment of the Municipal court is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

Home Co. v. Dawson et al., 149 Ill. 138; C. & C. Coal Co. v. Whitsett, 238 Ill. 623.

No sufficient reasons are presented showing that plaintiff was entitled to recover, and the judgment of the Municipal court is affirmed.

AFFIRMED.

Davey, P. J., and Matchett, J., concur.

161 - 26820

ANDREW J. O'CONNELL,
Appellant,

vs.

JACOB MYERS,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

223 I.A. 635

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, O'Connell, brought suit alleging that while he was in the exercise of ordinary care for his own safety, defendant so negligently drove and operated his automobile as to strike plaintiff, inflicting injuries for which he claims compensation. Upon trial the jury found defendant not guilty, and judgment was entered accordingly, from which plaintiff appeals. As the judgment must be reversed and the cause remanded because of errors upon the trial, it is unnecessary to discuss the facts of the occurrence.

The identity of defendant as the owner and operator of the automobile which struck plaintiff was a controverted point. Plaintiff claims that this was admitted by a special plea, hence was not in issue and that the court erred in refusing to instruct the jury that defendant, by his plea, admitted ownership. We do not think the position is well taken. The first pleas filed by defendant were the general issue and a special plea denying ownership and operation; subsequently another special plea was filed, the substance of which was that plaintiff was covered by the Compensation Act. In this plea defendant admitted the ownership of an automobile operating upon the streets of Chicago, "which plaintiff alleges collided and struck upon him." Strictly construed, this plea does not admit ownership and operation of the automobile which struck plaintiff, but even if it did, defendant had the right to file inconsistent or contradictory pleas, and one plea

ANDREW J. O'CONNELL,
Appellant,

vs.

JACOB MYERS,
Appellee.

COOK COUNTY.

APPEAL FROM CIRCUIT COURT,

MR. JUSTICE MOSSMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, O'Connell, brought suit alleging that while he was in the exercise of ordinary care for his own safety, defendant so negligently drove and operated his automobile as to strike plaintiff, inflicting injuries for which he claims compensation. Upon trial the jury found defendant not guilty, and judgment was entered accordingly, from which plaintiff appeals. As the judgment must be reversed and the cause remanded because of errors upon the trial, it is unnecessary to discuss the facts or the occurrence.

The identity of defendant as the owner and operator of the automobile which struck plaintiff was a controverted point. Plaintiff claims that this was admitted by a special plea, hence was not in issue and that the court erred in refusing to instruct the jury that defendant, by his plea, admitted ownership. We do not think the position is well taken. The first plea filed by defendant was the general issue and a special plea denying ownership and operation; subsequently another special plea was filed, the substance of which was that plaintiff was covered by the Compensation Act. In this plea defendant admitted the ownership of an automobile operating upon the streets of Chicago, "which plaintiff alleged collided and struck upon him." Strictly construed, this plea does not admit ownership and operation of the automobile which struck plaintiff, but even if it did, defendant had the right to file inconsistent or contradictory pleas, and one plea

cannot be taken advantage of to help or vitiate another, and is neither an admission nor evidence of a fact denied in another. Street R. R. Co. v. Morrison, 160 Ill. 288; Barker v. Barth, 88 Ill. App. 23, affirmed in 192 Ill. 460; 31 Cyc. 210. The plea of non-ownership still remained in the case and placed upon plaintiff the burden of proving the allegations of the declaration upon this point.

The testimony as to the identity of defendant with the person inflicting the alleged injuries to plaintiff, did not so prove the defense as to compel the verdict rendered in spite of errors upon the trial. There were such strong contradictory affirmations and assertions from the various witnesses as to make necessary a trial free from the influence of improper conduct of counsel.

Defendant introduced in evidence what is called a release, signed by plaintiff, reciting that for the sum of $80 paid by the Travelers' Insurance Co. plaintiff had released the Ferro Construction Co. (his employer) and the Travelers' Insurance Co. from liability and as full settlement for all compensation from them under the Compensation Act. This was proper as tending to impeach previous testimony given by plaintiff but counsel for defendant commenting thereon in the presence of the jury said, "You cannot make a claim in one court and come in here and try and hold somebody else up," and again, "Gentlemen of the Jury: This is an $80 law suit. The Plaintiff has been paid his damages in this case by an Insurance Company under his claim to the Insurance Company under the Compensation Act, and he signed a release of his claim and assigned his claim to the Insurance Company." This was unjustified and prejudicial. Evidence as to the wife and children of defendant was incompetent and especially pre-

and obligation of defendant was incompetent and especially pre-
This was material and prejudicial. Evidence as to the mis-
his claim and analyzed his claim to the Insurance Company."
Company under the Compensation Act, and in signed a release of
this case by an Insurance Company under his claim to the Insurance
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judicial was the argument of defendant's counsel in which he said, "Gentlemen of the Jury: In considering your verdict in this case, have sympathy for the Defendant and his wife and children." Even where the court sustained objections the harmful effects of such remarks are not removed.

For the reasons above indicated, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

judicial was the argument of defendant's counsel in which he said, "Gentlemen of the jury: In considering your verdict in this case, have sympathy for the defendant and his wife and children." Even where the court sustained objections the harmful effects of such remarks are not removed.

For the reasons above indicated, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dover, P. J., and Mitchell, J., concur.

170 - 26829

W. H. EMERSON,
Appellant,

vs.

NORTH AMERICAN TRANSPORTATION & TRADING CO., a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 635

MR. JUSTICE McCUBBEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on a certificate of deposit for $10,000, upon trial by the court was held not entitled to recover; he appeals from the judgment of nil capiat.

The certificate was dated March 31, 1900. Demand was made December 13, 1916, and suit commenced June 15, 1917. The controverted points relate to (1) the statute of limitations, (2) the necessity of a demand within a reasonable time, and (3) the effect of section 20 of the Illinois statute of limitations.

The court found the facts to be that the plaintiff, W. H. Emerson, on March 31, 1900, deposited with the defendant at Nome, Alaska, the sum of $10,000 and thereupon by its duly authorized agent, the defendant executed and delivered to plaintiff a certificate of deposit as follows:

"$10,000.00 CERTIFICATE OF DEPOSIT No. H761
NORTH AMERICAN TRANSPORTATION & TRADING CO.
Nome,
Healy, Alaska, 3/31"/900

THIS CERTIFIES that W. H. Emerson has deposited Ten Thousand Dollars payable to the order of W. H. Emerson upon return of this Certificate properly endorsed. Not subject to check, and redeemable in gold dust at the current rate of exchange 16.00 per oz or in U. S. or Canadian currency at the Company's option.

NORTH AMERICAN TRANSPORTATION & TRADING CO.
By R. J. Embleton;"

that December 13, 1916, plaintiff endorsed this instrument and presented it at the principal office of the defendant in the City of Chicago, and payment was refused; that defendant is a

170 - 26828

T. H. EMERSON,
Appellant,

vs.

NORTH AMERICAN TRANSPORTATION & TRADING CO., a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 638

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on a certificate of deposit for $10,000, upon trial by the court was held not entitled to recover; he appeals from the judgment of nil capiat.

The certificate was dated March 31, 1900. Demand was made December 13, 1916, and suit commenced June 1, 1917. The controverted points relate to (1) the statute of limitations, (2) the necessity of a demand within a reasonable time, and (3) the effect of section 20 of the Illinois statute of limitations.

The court found the facts to be that the plaintiff, T. H. Emerson, on March 31, 1900, deposited with the defendant at Nome, Alaska, the sum of $10,000 and by its duly authorized agent, the defendant executed and delivered to plaintiff a certificate of deposit as follows:

"$10,000.00. Certificate of Deposit. No. 7702.
NORTH AMERICAN TRANSPORTATION & TRADING CO.
Nome,
Alaska, 3/31/1900

This certifies that T. H. Emerson has deposited Ten Thousand Dollars payable to the order of T. H. Emerson upon return of this Certificate properly endorsed. Not subject to check, and redeemable in gold dust at the current rate of exchange 16.00 per oz or in U. S. or Canadian currency at the Company's option.

North American Transportation & Trading Co.
By A. Ralston;"

that December 13, 1916, plaintiff endorsed this instrument and presented it at the principal office of the defendant in the City of Chicago, and payment was refused; that defendant is a

corporation organized under the laws of Illinois on April 14, 1892, and has at all times thereafter maintained its principal office in Chicago, Illinois; that the plaintiff since the year 1904 has resided in California; that defendant maintained and operated certain branches of its business at various points in Alaska and also at Seattle in the State of Washington; that among the branches in Alaska was one at Nome, Alaska, which was operated there from the winter of 1899 to some time in 1905, but not after May 1, 1905, at which time the defendant discontinued the operation of its station or place of business at Nome; that prior to 1900 and continuously up to the time of the trial, defendant had certain agents and representatives in Alaska engaged in and conducting its business, and has been capable of being sued and served with process in Alaska; that plaintiff never presented the instrument sued upon to defendant or made any demand upon defendant for the payment of the same until December 13, 1916, although from and after the date of said instrument, March 31, 1900, it could have been presented to defendant and payment of same demanded by plaintiff either in Alaska or in Chicago, Illinois; that said certificate had never been paid and that defendant has not delivered to plaintiff the quantity of gold dust specified therein, or returned to plaintiff the amount of $10,000 deposited. It was also found, as a matter of fact, that the statute of limitations of the territory of Alaska applicable to instruments of this kind required action to be commenced thereon within six years next after the cause of action had accrued upon such instrument.

Plaintiff questions the findings with reference to the status of the defendant in Alaska with particular referance to its license to carry on business there. We hold, however, that the evidence justifies the conclusions of the court.

the evidence justifies the conclusions of the court.

to its license to carry on the business. We will, however, that the return of the defendant in error to the state of Illinois

Plaintiff dismisses the complaint with prejudice to course of action had occurred upon such instrument.

action to be commenced thereon at any time six years next after the

history of Banks applicable to instruments in all the kind required no matter of fact, that the statute of limitations of this ter-

to plaintiff the amount of $15,000.00 demanded. It was also found,

Plaintiff's quarrel is to a **dust** spec[illegible] or returned

cate had never been paid and the defendant had not delivered to

title after in Illinois to Chicago, Illinois; that said certifi-

been presented to defendant [illegible] amount of same do[illegible] by plain-

after the date of said instrument, June 21, 1900, it could have

the payment of the same until December 17, 1910, although from and

ments made upon to defendant or to do any demand upon defendant for

with process in Alaska; that plaintiff never presented the instru-

ment, and has been capable of being used and served

certain ago is and representatives [illegible] alleged in said con-

1900 and continuously up to the time of the trial, defendant had

sion of the station or place of business at Nome; that prior to

May 1, 1900, at which time the defendant discontinued the opera-

there from the winter of 1899 to some time in 1905, but not after

the premises in Banks was one at Nome, Alaska, which was operated

Alaska and also at Seattle in the State of Washington; that among

operated certain agencies of the business at various points in

1904 has resided in California; that defendant maintained and

office in Chicago, Illinois; that the plaintiff since the year

1902, and has at all times thereafter maintained its principal

corporation organized under the laws of Illinois on April 14,

We have concluded that the judgment should be affirmed because of the failure of the plaintiff to make a demand within a reasonable time. However, before commenting upon this point, we note briefly two other matters presented in the briefs.

Defendant contends that the action is barred by the statute of limitations of Illinois, which is ten years, or of Alaska, which is six years; that the certificate of deposit is in legal effect a promissory note payable on demand, hence due on the date of its execution, so that the statute of limitations began to run from its date. The supporting cases are Bank of Peru v. Farnsworth, 18 Ill., 563; Laughlin v. Marshall, 19 Ill., 390; Swift v. Whitney, 20 Ill., 144; Hunt v. Divine, 37 Ill., 137, and the later cases of Kavanagh v. Bank of America, 239 Ill., 404, and People v. Belt, 271 Ill., 342. In these cases certificates of deposit have been held to be like a promissory note, payable on demand and governed by the rules and principles applicable to that class of paper. But it has also been held that, under certain circumstances, a certificate of deposit has the character of a general deposit and not of a promissory note. In McCormick v. Hopkins, 287 Ill., 66, it is held that a certificate of deposit

> "has still the distinguishing features of the bank deposit that it is payable only upon demand at the bank and on the return of the certificate properly endorsed. The borrower of money who executes a promissory note for it is bound to seek his creditor and pay him, and a bank is not different in this respect from an individual. But a bank is not obliged to seek its depositors and pay them."

This opinion also quotes with approval from Elliott v. Capital City Bank, 128 Ia., 275, which held that such certificates are neither loans nor bailments in the strict sense of the term, but that it is a transaction peculiar to the banking business and one that courts should recognize and deal with according to commercial usage. In the ordinary deposit, unless circumstances are shown which amount to a legal excuse, a previous demand by the depositor or some other

> "the still the distinguishing features of the term deposit that it is payable only upon demand at the [illegible] of the return of the certificate properly endorsed. The borrower of money who executes a promissory note for it is bound to pay his creditor and pay him, and a bank is not obliged to seek its depositors on [illegible]. But a bank is not obliged to seek its depositors and pay them."

This opinion was quoted with approval from Ilsley v. Ontario City Bank, 12a Ia., 273, a case held not such conversion was neither known nor published in the United States at the term, but that it is a transaction peculiar to the British Dominions and not found in the ordinary deposit, unless circumstances [illegible] should reconcile and deal with according to [illegible]. In a legal sense, [illegible] to a legal account or some other

[illegible] 1 Ch. 111.. 365; Laurelin v. Warehall, 10 111.. 390; Burt v. Whitney, 20 111.. 144; Hunt v. Dirtine, 27 111.. 137. [illegible] Isoyle v. Bell, 271 111.. 342. In these cases certificates of deposit have been held to be like [illegible] promissory note, payable on demand and governed by the rules and principles applicable to that class of paper. But it has also been held that, under certain circumstances, a certificate of deposit has the characteristics of a general deposit and not of a [illegible] agreement. Bolder Tank v. Hamblin, 287 111.. 66, it is held that a certain form of deposit

person by his order is indispensable to the maintenance of an action for such deposit. Brahm v. Atkins, 77 Ill. 263, and cases cited.

Recognizing the variant decisions upon this point and without discussing or attempting to distinguish them, we quote as expressing our opinion from Daniel on Negotiable Instruments, 6th ed., vol. 2, p. 1907, where the author, noting the conflicting decisions as to when the statute of limitations begins to run on a certificate of deposit, says:

> "the certificate is payable when payment is demanded by the party entitled to receive the money, and who avouches the fact by producing the instrument with evidence of title. If the Statute of Limitations begins to run at once, suit must, of course, be maintainable at once, and, therefore, no prior demand would be necessary. But such is not the usual contemplation of either the depositor or the bank. The former seeks an indefinite investment of his funds. The bank is not expected, according to the usage and practice of such institutions, to seek him and offer payment, as in the ordinary case of a demand loan. And the better opinion seems to us to be that the Statute of Limitations only begins to run when there is an actual demand of payment in due form, and that such demand must precede a suit."

Section 20 of the Illinois Statute of Limitations, chap. 83, provides that

> "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

Defendant's claim that this bars the present action is met by the fact that it was a resident of Illinois at the time the cause of action accrued and still is. We have held that section 20 does not apply unless the parties were non-residents of Illinois at the time the cause of action accrued. Delta Bag Co. v. Leyland & Co., 173 Ill. App. 38. See also Chicago Mill & Lumber Co. v. Townsend, 203 Ill. App. 457, and cases there cited.

The certificate of deposit in question was payable upon its return properly endorsed. This implies a demand for payment, which defendant contends must be made within a reasonable

person by his order is indispensable to the maintenance of an action for such dedonati. Brown v. Union, 77 Ill. 203, and cases cited.

Recognizing the weight decisions upon this point and without discussing or attempting to distinguish them, we deem ourselves bound by the opinion (not denial on technical Instruments, 6th ed., vol. 2, p. 1902, where the author notes the conflicting decisions as to when the statute of limitations begins to run on a certificate of deposit, says:

> "The certificate is payable when payment is demanded by the party entitled to receive the money, and who produces the certificate in person or by agent. Not such is not the usual course, be watchful of his own affairs, therefore, a prior demand would be necessary. Yet such is not the usual course of business with the debtor or the bank. The former avoids publication of neglect the debtor or the bank. The former avoids an indefinite investment of his funds. The bank is not expected, according to the usual practice of such institutions, to make his own affair payment, as in the ordinary case of a demand loan. And the better opinion seems to be to be that the statute of limitations only begins to run when there is an actual demand of payment in and form, and that upon demand must precede a suit."

Section 40 of the Illinois Statute of Limitations, chap. 83, provides that

"When a cause of action has risen in a state of territory out of this state, or in a foreign country, and the law thereof on action thereon can not be maintained by reason of the lapse of time, no action (person can) shall be maintained in this state."

Defendant' loan that the statute bar the present action is met by the fact that it was a conduct of Illinois at the time the cause of action accrued. Note Sec 70. v. Ryland 2 Co., 172 Ill. 1. 50. See also Wheeler v. Ill. & Miss. Co., 202 Ill. 307, 66 Amer. Dec. 373, 36 cases there cited.

The certificate of deposit is dated Nov. 1st 1907 upon its return the only ordered. This indicates [illegible] for payment, which does not appear within a reasonable

time; the alternative is a perpetual liability of the defendant, which the policy of the law interdicts. In justness and fairness there should be some duty upon the holder of such a certificate to act with reference thereto within some reasonable period, depending upon the circumstances of the case. In 25 Cyc. 1096, it is stated that, while a demand may generally be necessary to start the statute of limitations in motion, it must, as in other cases, be made within a reasonable time. On page 1198 the rule is stated thus:

> "Where plaintiff's right of action depends upon some act to be performed by him preliminary to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act; if the time for such performance is not definitely fixed, a reasonable time, but that only, will be allowed therefor. The rule that where the right of action depends upon a preliminary step to be taken by plaintiff he cannot indefinitely delay the taking thereof rests upon the principle that plaintiff has it in his power at all times to do the act which fixes his right of action."

Where there are no special circumstances amounting to a legal excuse, a reasonable time for making the demand will not be beyond the statutory period of limitation prescribed for bringing the particular kind of action, and at the expiration of that time, if no demand has been made, the statute of limitations will begin to run, as the law will presume that the demand was made at the proper time. In Codman v. Rogers, 10 Pick. (Mass.) 111, a claim lay dormant for seventeen years, during which time a demand might have been made, but was not, and no reason assigned for the omission. It was held that the demand should have been made within a reasonable time. The court says:

> "A party must not be permitted to sleep over his rights to the prejudice of the party on whom he makes a claim and who, by the delay, may be deprived of the evidence and means of effectually defending himself."

This rule was applied to a certificate of deposit in Pierce v. State National Bank, 215 Mass., 18, citing a number of

Hearne v. Marine Nat'l Bank, 213 Wash., 10, certain manner of stated that, while a demand may generally be necessary to it is stated that, while a demand may generally be necessary to depending upon the circumstances of the case. In 43 Cyc. 1008, to act with reasonable promptness within some reasonable period, depending upon the circumstances of each case. In 43 Cyc. 1008, there should be some duty upon the holder of such a certificate in a reasonable time. In Justness and fairness which the policy of the law intends. In justness and fairness time; the alternative is a perpetual liability of the defendant,

> "A party must not be permitted to play fast and loose to the prejudice of the party on whom he relies - claim one to, by the delay, and to deprived of the evidence and means of effectually defending himself."

This rule was applied to a certificate of deposit in

> "Where there are no special circumstances to the contrary, a reasonable time for making the demand will not be deemed the date of refusal, and the explanation of that delay, if no demand was made, and no action brought for several years, during which time a demand at the proper time. In Cochran v. Hoberg, 3 Wash. (Unof.) 117, a demand the particular kind of notice, and the explanation of that be beyond the statutory period of limitation prescribed for bringing the action, a reasonable time for making the demand will not begin to run, as the law will presume that the demand was made in a reasonable time. The court says:

> "It was held that the demand should have been made within a reasonable time, but when not, and no notice was given of the existence of the claim, the demand for payment was not barred by the statute of limitations. In Jackson v. Bank of Commerce, 23 Wash. 1, 61 Pac. 1128 the rule is stated thus:

> "Where plaintiff's right of action depends upon some act to be performed by him preliminary to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act; it has time for such performance is not definitely fixed by statute, but that only, will be allowed thereafter, a reasonable time, the right of action depends upon a prompt delay the taking steps to be taken by plaintiff be cannot indefinitely limitary steps to be taken by plaintiff be cannot indefinitely plaintiff may be barred by the statute of limitations, but where the right of action depends upon a prompt rule that where the right of action depends upon a prompt

> "A party must not be permitted to play fast and loose to the prejudice of the party on whom he relies - claim one to,

Massachusetts cases holding that the time within which a demand must be made is the time limited for bringing an action. We find this rule applied in a large number of cases in other states; among them are Wright v. Paine, (Ala.) 34 Am. Rep. 24; Thomas v. Pacific Beach Co., (Cal.) 46 Pac. 899; Williams v. Bergin, (Cal.) 47 Pac. 877, 878; High v. Board of Commissioners, 92 Ind. 580; Atchison, T. & S. F. R. Co. v. Burlingame Township, (Kas.) 14 Pac. 271, 273; Travelers Ins. Co. v. Stucki, (Kas.) 46 Pac. 42; Smith v. Smith's Estate, (Mich.) 51 N. W. 694; Landis v. Saxton, (Mo.) 16 S. W. 912; State v. Horton, (Minn.), 61 N. W. 458; Keithler v. Foster, 22 Ohio St. 27, 31; Thrall v. Mead, 40 Vt. 540: Beury Bros. Coal & Coke Co. v. Fayette County Court, (W.Va.) 87 S. E. 258. In Shelburne v. Robinson, 8 Ill., 597, the general principle is stated. There are cases to the contrary, notably Elliott v. Capital City State Bank, 128 Ia. 275.

The reasonableness of requiring that de and shall be made within a reasonable time is emphasized by the facts of this case. There is the unexplained delay in presenting the certificate of nearly seventeen years. In the meantime the agent of defendant who signed the certificate, Embleton, has disappeared and his probable death is suggested. There is also the disappearance of other persons who might have had some knowledge of the transaction. There is also the disappearance or destruction of the books of the defendant containing the records of business at Nome, Alaska. There were produced certain annual trial balances or audits purporting to show deposits on hand at Nome on dates beginning May 31, 1900, and annually thereafter, including December 31, 1919. These do not show any record of any certificate of deposit of $10,000. They show certificates of deposit outstanding on May 31, 1901, for over $15,000, on May 31, 1902, something over $7,000, and from

May 31, 1905, to 1919, $48.80 on each year. There was testimony that all of the outstanding certificates had been paid except this item, the holder of which had never appeared and could not be located. There is also the fact, which is not without significance, that the plaintiff gave no testimony whatever upon the trial of this case, either in person or by deposition, and as he did not appear at the trial, defendant had no opportunity to cross examine him. It has been held that a plaintiff's failure to testify raises an inference that his claim is not in good faith. 9 Ency. of Ev., 958; Harding v. American Glucose Co., 182 Ill., 551.

The certificate of deposit having been made in Alaska, its law must govern its obligations, as no other specific place of performance is designated. 12 Corp. Juris, par. 30; Bond v. Bragg, 17 Ill. 69. The reasonable time for plaintiff to make a demand for payment was within the period of the Alaska statute, which would end in March, 1906. Upon the legal presumption that demand was then made, the cause of action then accrued and the statute of limitations then began to run. It is unimportant as to whether the statute of limitations then commencing was that of Alaska, six years, or of Illinois, ten years, for the suit was not commenced until after the expiration of the longer period.

If it be suggested that, as defendant closed its station at Nome in May, 1905, presentation of the certificate at that place thereafter would have been unavailing, it is sufficient to reply that the evidence discloses that defendant maintained a number of other stations or agencies in Alaska in 1906 and for some time thereafter. It was also sufficiently proven that license fees to do business within the territory were paid for some years, including the year 1917. In any event the burden was upon the plaintiff to show an excuse for not making a demand in Alaska within a reasonable time, that is, within six years after the

May 31, 1902, to 1919, $40.80 on each year. There was testimony that all of the outstanding certificates had been paid except this item, the holder of which had never answered and could not be located. There is also the fact, which is not without significance, that the plaintiff gave no testimony whatever upon the trial of this case, either in person or by deposition, and we do not appear at the trial, defendant had no opportunity to cross examine him. It has been held that a plaintiff's failure to testify raises an inference that his claim is not in good faith. 2 Enc. of Ev., 938; Harding v. American Lincoln Co., 182 Ill., 591.

The certificate of de novo having been made in Alaska, its law must govern its operation as to other negotiable place of performance is designated. 12 Corp. Jurid., sec. 30; Hood v. Brant, 17 Vt., 82. The recognizance in the plaintiff to make a demand for a meet and attain the period of the Alaska statute, which would end in June, 1904, then the legal presumption that during such time the cause of action was barred. Upon the question of the statute of limitations the rule is unimportant we to whether the note be of limited one then controlling was that of Al Oka, a x Parte, 12 Or 1 Idaho, 500 Pac., for the suit was not commenced until after the expiration of the longer period, [illegible] the statute of limitations [illegible] tion at Juno in Ky., 192 , [illegible] plaintiff to place therefor would [illegible] sufficient to [illegible] that the statute does not run [illegible] par of other states [illegible] time thereafter. It was [illegible] leave to do [illegible] within the territory [illegible] including the year 1917. It may [illegible] plaintiff to show an excuse for not [illegible] within a reasonable time, that is, within [illegible] time for the

date of the certificate.

For the reasons above indicated the judgment of the Municipal court is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

date of the certificate.

For the reasons above indicated the judgment of the Municipal court is affirmed.

AFFIRMED.

Dover, P. J., and Matchett, J., concur.

216 - 26876

ELSIE HOLDEN,
Appellee,

vs.

YELLOW CAB COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

223 I.A. 635[3]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff having been struck and injured by a taxicab belonging to the defendant brought suit for compensation, and upon trial had a verdict for $3,000; from the judgment thereon defendant appeals.

The accident happened in the evening of March 9, 1919, at the intersection of North Michigan boulevard, which runs north and south, and Chicago avenue, which runs east and west in Chicago.

The only questions argued are those of fact touching the alleged contributory negligence of the plaintiff and the negligence of the driver of the taxicab.

The jury properly could believe that at the time in question a police officer was stationed at the intersection for the purpose of regulating the traffic; that this was done by giving whistles, one whistle indicating that the north and south bound vehicles should proceed, two whistles indicating that the east and west bound traffic should move; that these are the usual and customary signals for the regulation of traffic at street intersections in Chicago; that plaintiff crossed this intersection every day and was familiar with the traffic regulations; that the driver of the taxicab in question was experienced and drove on Michigan boulevard nearly every day and was familiar with the system of handling traffic at this point.; that plaintiff was walking east on the north side of

816 - 26876

MINNIE HOLDEN,

Appellee.

vs.

YELLOW CAB COMPANY,

Appellant.

Appeal from Superior Court
of Cook County.

MR. JUSTICE [illegible] delivered the opinion of the court.

Chicago avenue, and as she was at the corner of Michigan boulevard the police officer gave two whistles for the traffic to move to the east and west and for the north and south bound traffic to stop; that pursuant thereto the east and west traffic began to move; that a large motor bus, coming from the north, stopped upon the signal of the officer about 15 feet off the crosswalk of Chicago avenue; that plaintiff passed in front of this going easterly pursuant to the signal and the movement of the traffic; that the taxicab in question was coming from the north on Michigan boulevard, and when about 150 feet north of Chicago avenue was going at a speed of from twenty-five to 30 miles an hour; that when plaintiff got beyond the standing motor bus some little distance she saw the approaching taxicab and, assuming that its driver would be obedient to the officer's signal and observant of the traffic movement, proceeded to cross the street. The driver of the taxicab, however, either because of his excessive speed or through failure to notice the signals of the officer and the movement of the traffic, proceeded to cross Chicago avenue and struck plaintiff, injuring her. There was evidence that after it struck her the taxicab did not stop until it got to the south side of Chicago avenue. Although it was customary to have a police officer at this intersection to regulate traffic, the driver of the taxicab testified that he did not know whether there was any officer there or not; that he "didn't look for one."

With these facts before it, the jury was justified in finding that defendant's driver was negligent in his operation of the car and that plaintiff had the right to assume the traffic regulations would be obeyed, as she herself was doing in proceeding to cross the street; that in so doing she was not guilty of contributory negligence.

We have carefully read the exhaustive brief and argu-

[illegible] to have mentally read the intervening [illegible] circumstantial testimony.

[illegible] to cause the street; that [illegible] of conflicting [illegible] would be opened, we are [illegible] reversing [illegible] of the case must [illegible] in causing [illegible] to [illegible] the traffic [illegible] duty.

With three [illegible] there was [illegible] the driver of the [illegible] to have a police officer at [illegible] to regulate traffic. But to the south side of Chicago avenue. Although it was quasi-evidence that [illegible] across Chicago avenue and [illegible] injuries per. Plaza was [illegible] main of the officers and the movement of the traffic, proceeded to [illegible] use of his accustomed speed or [illegible] to notice the pedestrian [illegible] cross the street. The driver of the taxicab, however, either [illegible] noor's signal any observant of the traffic officer, proceeded to taxicab and, assuming that its driver would be apprised to the situation [illegible] the standing motor [illegible] gave the accelerating [illegible] from twenty-five to 30 miles an hour; that when plaintiff got beyond when about 100 feet north of Chicago avenue and noting at a speed of cap in question was coming [illegible] on Division avenue, and [illegible] to the right and the movement of the traffic; that the taxicab ~~was~~ plaintiff [illegible] in front of this moving mechanism [illegible]

vacuum;

the right of the officer [illegible] out 12 feet off the crosswalk of move; that a large motor car, coming [illegible] north, stopped upon [illegible] that pursuant thereto the east and west traffic began to stop; that pursuant thereto the east and west bound traffic to the east and west and for the north and south bound traffic to the police officer gave the [illegible] for the traffic to move to Chicago avenue, and as he was at the corner of Hoffman boulevard

ment of the able counsel for the defendant, but some considerable experience in this class of cases has not permitted us to make the affirmance of this judgment as difficult as the brief seems to indicate it should be.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

ment of the rule governed for the deferment, but some considerable experience in this class of cases has not permitted us to make the efficiency of this judgment as difficult as the brief seems to indicate it should be.

Dever, D. J., and Whitcomb, J., concur.

Certiorari denied

252 - 26913

WILLIAM D. DIFFENBAUGH,
Appellee,

vs.

ADOLPH ECKHAUS,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

223 I.A. 635[4]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, while driving his automobile, was struck by defendant driving his automobile. Upon suit for damages for personal injuries received the plaintiff had a verdict for $7500 and judgment was accordingly entered, from which defendant appeals.

The declaration in various counts alleges that (1) defendant so carelessly and negligently ran his automobile that it ran into machine of plaintiff; (2) wilful and wanton conduct in running the automobile; (3) and (4) excessive speed. The plea was the general issue.

The accident happened on the morning of May 21, 1918. Plaintiff was driving his automobile south on Union avenue, a north and south street in Chicago, while defendant was driving his automobile west along 45th street, which runs east and west. The accident happened at the intersection of the two streets. This is a mixed residence and business district. On the northwest corner is a public school, on the southwest corner a residence, on the southeast corner a store and flat building and on the northeast corner a store and flat building built out to the lot lines.

The jury properly could believe that plaintiff was moving south on Union avenue near the west curb, and as he approached 45th street was going at about ten to fourteen miles an hour. As he approached 45th street, he looked eastward and west-

WILLIAM D. DIETERMANN,

Appellee,

vs.

ADOLPH BECKER, JR.,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

226 I.A. 6838

MR. JUSTICE MCGURREN DELIVERED THE OPINION OF THE COURT.

Dietermann", while driving his auto civil, was struck by defendant driving his automobile. Upon suit for damages for personal injuries received the plaintiff had a verdict for $7830 and judgment was accordin ly entered, from which defendant appeals.

The declaration is various counts [illegible] that

(1) defendant so carelessly and negli ently [illegible] that it ran into machine of plaintiff; (2) [illegible] conduct in running the motor [illegible]; (3) and (4) [illegible] The plea was the general issue.

The accident occurred on the morning of [illegible], [illegible] Dietrich was driving his automobile west on Wilson Avenue, a north and south street in Chicago, while defendant was driving his automobile west along 47th street. Upon [illegible] dent happened at the intersection of the two streets. [illegible] mixed residence and business district. On the northeast corner is a public school, on the southeast corner a [illegible], on the southwest corner a store and flat building, and [illegible] corner a store and flat [illegible] lot [illegible], [illegible] facing north on Dixon Avenue [illegible] -

ward for other vehicles. He could see about sixty or eighty feet east on 45th street, but saw nothing. He proceeded, but when he got into 45th street he saw defendant's automobile coming westerly about 100 to 125 feet east of Union. Defendant was driving his machine at this time at about 25 miles an hour, which he increased as he neared the intersection to about 30 or 40 miles an hour. He did not signal with his horn. Plaintiff proceeded southward on Union and had reached the south side of 45th street with the front end of his car south of the curb at the southwest corner, or, as some witnesses say, the entire car was south of the curb. At this time defendant, with increased speed, turned southwesterly directly for plaintiff's machine, striking it on the lefthand side towards the rear, knocking it over the curb and overturning it upon the parkway. Testimony and photographs in the record show that it was very badly wrecked, indicating that the defendant's car must have been impelled against it with great force and speed.

It is not argued that the verdict was against the preponderance of the evidence, but that it was error by the court to submit to the jury the question of wanton and wilful conduct of the defendant in the operation of his automobile. This was done by submitting a special interrogatory as follows: "Was the conduct of the defendant, as shown by a preponderance of the evidence, of such a reckless character as to show an utter disregard for the safety and lives of other persons?" which was answered by the jury in the affirmative; also by certain instructions to the effect that, if the jury believed that the injury was inflicted recklessly, wilfully and wantonly, and that this was the approximate cause of the injury to the plaintiff, contributory negligence of the plaintiff, if any, would not prevent him from recovering. Submitting to the jury the question of the wilful and wanton conduct of the defendant was erroneous only if there was no evidence tending to prove this.

was circumvented only if there can be evidence for him to know else.

that the question of the evil and wanton conduct o[illegible] the jurors, would not prevent him from recovering. Unwittingly in the trial to the plaintiff, counsel took [illegible] and the jury [illegible] fatally and wantonly, and that if he [illegible] the jury believed that the [illegible] the jury [illegible] ultimately also by certain [illegible] and time of other verdicts" and [illegible] the a reckless character of [illegible] other [illegible] and verdict the defendant. As above [illegible] to [illegible], of much something a special interrogatory [illegible] the document of the defendant in the operation of the motorcycle. [illegible] long it so submit to the jury the question of [illegible] and wilful conduct of disregard of the [illegible] in the [illegible] of the [illegible] of the court

It is not argued [illegible] the verdict [illegible] the have been [illegible] and it is [illegible] in point.

may very badly mislead [illegible] the defendant in any suit the party. Testimony and [illegible] in the record does that it towards the rear, [illegible] over the [illegible] it upon dimness for plaintiff's use and, [illegible] it [illegible] right At this time defendant, with [illegible] speed, [illegible] suddenly saloon some distance by, the [illegible] car was [illegible] of the curb. the front end of his car was [illegible] of the north-west corner, went on Union and had reached the [illegible] side of [illegible] when he [illegible] and no warning the [illegible] to about 20 or 25 miles an hour. He did not slacken his pace. [illegible] proceeded south-ward, [illegible] the [illegible] at this time at about 20 miles an hour, [illegible] in-creased up to about 1200 to 1250 feet east of Union. Defendant was driving his machine at this time [illegible] motorcycle coming west-cast on 48th street, but was not noticing. He [illegible], but when he got into 48th street he saw defendant's motorcycle coming west-ward for other vehicles. He found one about midway or slightly [illegible]

It is asserted that, even if defendant's car was driven at a high and excessive rate of speed, this proves only gross negligence and not a wilful and wanton act, and that speed in and of itself cannot be such an act. Foster v. E. St. L. & S. Ry. Co., 158 Ill. App. 478. Wilful and wanton conduct has been defined as an act of such a reckless character as shows the person is acting in such a manner as indicates an utter disregard for the safety and lives of others. I. C. R. R. Co. v. Leiser, 201 Ill. 624. "An entire absence of care for the life, person or property of others, if such as exhibits indifference to consequences." Heidenreich v. Bremmer, 260 Ill. 446.

> "An intentional disregard of a known duty necessary to the safety of a person or property of another and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness such as charges a person whose duty it was to exercise care with the consequences of wilful injury.
>
> Walldren Express Co. v. Krug, 291 Ill. 476.
>
> "Ill will is not a necessary element of a wanton act. To constitute a wanton act, the party doing the act, or failing to act must be conscious of his act, though having no intent to injure, must be conscious from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.
>
> Bernier v. I. C. R. R., 296 Ill., 470."

In People v. Falkovitch, 280 Ill., 321, the defendant caused the death of another by striking him with an automobile which he was driving at a high rate of speed. He was indicted and found guilty of manslaughter. To drive recklessly at a high rate of speed without warning across a place where others may reasonably be expected to be, is wilful and wanton conduct. Fretchett v. I. C. R. R. Co., 197 Ill. App. 224; Heice v. Chicago & A. R. R. Co., 254 Ill., 604. Whether the defendant was guilty of wilful or wanton conduct or gross negligence was a question of fact to be submitted to the jury and not to be determined by the court. C. B. & Q. v. Marowski, 179 Ill., 80, and it must be submitted to the jury if the record dis-

It is asserted that, even if defendant's car was driven at a high and excessive rate of speed, this proves only those negligences and not a willful and wanton act, and that used in one of itself cannot be much an act. Spencer v. [illegible], 238 Ill. App. 478. Willful and wanton conduct is a deliberate act, and as an act of such a reckless character as to show the person in charge in such a manner as indicates an utter disregard for his safety and like of others. I. C. R. Co. v. [illegible], 251 Ill. 624. "An entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, does a case of constructive or legal willfulness such as charges a person whose duty it was to exercise care with the consequences of willful injury."

Illinois Zinc Co. v. Lyon, 191 Ill. 494.

"Will is not necessarily malice, or a wanton act. To constitute wantonness, the act [illegible] or failure to act must be conscious of its act, though having no intent to injure, must be consciously done [illegible] of others. [illegible] and extreme care [illegible] to injure by or actually result in it."

Lawlor v. [illegible], 240 Ill. 494.

In Keokuk v. Kavanaugh, 200 Ill., 320, the trial court caused the deaf [illegible] by stating [illegible] which [illegible] quality of manslaughter. To drive recklessly [illegible] speed be was driving at a high rate of speed. [illegible] and found

[illegible] v. [illegible], 240 Ill. 494.

[illegible] 80, and it must be submitted to the jury if the record discloses negligence and a question of fact to be submitted to the jury and not to be determined by the court. [illegible] v. Spencer, 238 Ill. 478. Whether the defendant was guilty of [illegible] or [illegible] Ill. App. 344; Deike v. [illegible], 238 Ill. 494. to be in willful and wanton conduct. Kavanaugh v. [illegible], without warning caused a piece of [illegible] injured quality of manslaughter. To drive recklessly [illegible] speed be was driving at a high rate of speed. [illegible] and found caused the death of [illegible] by stating [illegible] which [illegible] Keokuk v. Kavanaugh, 200 Ill., 320, the trial court [illegible] or actually result in it."

Lawlor v. [illegible], 240 Ill. 494.

"Will is not necessarily malice, or a wanton act. To constitute wantonness, the act [illegible] or failure to act must be conscious of its act, though having no intent to injure, must be consciously done [illegible] of others. [illegible] and extreme care [illegible] to injure by or actually result in it."

Illinois Zinc Co. v. Lyon, 191 Ill. 494.

"A reckless disregard of [illegible] known only necessarily to the safety of a person or property of others, such as exhibits indifference to consequences." Pennington v. Spencer, 238 Ill. 478.

"Willful and wanton conduct is a deliberate act, and as an act of such a reckless character as to show the person in charge in such a manner as indicates an utter disregard for his safety and like of others. I. C. R. Co. v. [illegible], 251 Ill. 624. "An entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, does a case of constructive or legal willfulness such as charges a person whose duty it was to exercise care with the consequences of willful injury."

Illinois Zinc Co. v. Lyon, 191 Ill. 494.

"Will is not necessarily malice, or a wanton act. To constitute wantonness, the act [illegible] or failure to act must be conscious of its act, though having no intent to injure, must be consciously done [illegible] of others. [illegible] and extreme care [illegible] to injure by or actually result in it."

Lawlor v. [illegible], 240 Ill. 494.

In Keokuk v. Kavanaugh, 200 Ill., 320, the trial court caused the death of [illegible] by stating [illegible] which [illegible] quality of manslaughter. To drive recklessly [illegible] speed be was driving at a high rate of speed. [illegible] and found

closes any evidence tending to support the charge in the declaration. E. J. & E. Ry. Co. v. Duffy, 192 Ill. 498.

From consideration of these cases and others which might be cited, we are of the opinion that it was purely a question of fact to be submitted to the jury as to whether the defendant in driving his car at a high rate of speed without sounding his horn as he approached an intersecting street where other vehicles would reasonably be expected to be, was wanton and wilful conduct inflicting the injuries in question.

The suggestion that the evidence tends to show that when defendant saw a collision was inevitable, he attempted to avoid it, and hence could not have been guilty of an intentional wrong, is met by People v. Gumberis, 297 Ill., 481, and People v. Swarts, 293 Ill. 218, where it is held in substance that the attempt at the last minute to avoid or dodge an accident does not of itself negative wilful and wanton conduct.

It is argued that the jury should not have been instructed they might find the defendant guilty of wilfully and wantonly injuring plaintiff by a preponderance of the evidence, because plaintiff might have the right to enforce his judgment against the defendant by imprisonment; hence the rule as to the quantum of proof must be the same as in a criminal case, that is, beyond a reasonable doubt. The instruction as to the preponderance of the evidence is in the usual form and has been approved in numerous cases in actions of this kind. It has also been approved in an action for personal injuries charging a wilful and wanton act, in the recent decision in Bernier v. I. C. R. R. Co., 296 Ill. 474. If there should be any doubt as to the applicability of that decision, as the defendant there was a railroad company, we hold that the instant defendant cannot question the propriety of the instruction on the preponderance of the evidence because, at his

instance, the court gave four like instructions, namely, instructions Nos. 17, 18, 19, and 21, and is therefore estopped to complain of an instruction in substance like those requested by him and given. No. Chicago R. Ry. Co. v. Reuser, 190 Ill. 72.

One of the instructions given at the instance of the plaintiff began with these words: "The jury are instructed at the instance of the plaintiff". Undoubtedly so to designate an instruction for either party is bad practice and might cause a reversal. Plaintiff's counsel states that these words were inserted through inadvertence, which we are inclined to think is obvious. We are interested, however, in what was said by Judge Gary in Barnum & Richardson Mfg. Co. v. Wagner, 64 Ill. App. 375, to the effect that this manner of presenting instructions had been customary without comment for some twenty-five years before. While condemning the practice, this decision did not reverse the judgment on that account. The courts have also refused to reverse because of similar improper instructions in I. C. R. R. Co. v. Larson, 152 Ill. 326. Ansels et al. v. People, 134 Ill. 416.

We are not convinced that the reasons presented by defendant's counsel are sufficient to require a reversal of the judgment, and it is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

384 - 26558

ROTHSCHILD & COMPANY, a Corporation, for use of LONDON GUARANTEE AND ACCIDENT COMPANY, a Corporation,
Appellee,

vs.

JOHN GRIFFITHS and GEORGE W. GRIFFITHS, Doing Business as JOHN GRIFFITHS & SON,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

221 I.A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case was before us on a former appeal; Rothschild vs. Griffiths, 214 Ill. App. 29. A judgment in favor of appellee plaintiff was there reversed, this court holding, contrary to the ruling of the trial court, that the affidavit of merits presented triable issues of fact. The claim of plaintiff is on an alleged promise contained in a building contract entered into between plaintiff and defendants, whereby defendants agreed to indemnify and hold plaintiff harmless from certain claims, demands, judgments, etc., as in said agreement set forth.

One Elizabeth Baxter sued plaintiff in an action on the case for personal injuries sustained by her as a result of tripping on a certain canvas placed in front of the elevators on one of the floors in plaintiff's store, in which defendants and their subcontractors were at that time performing work under the terms of the building contract. The plaintiff claimed the demand was one which, under the terms of the contract, defendants were bound to save plaintiff harmless, and notified defendants to defend that suit, but defendants refused so to do. Mrs. Baxter thereafter prosecuted her claim to judgment, and on appeal to this

JOHN GRIFFITHS and SONS I.
GRIFFITHS, Doing Business as
JOHN GRIFFITHS & SON,
Plaintiffs.

vs.

LOCKHART COMPANY, a Corporation,
for use of LONDON BRICKYARDS LTD
NOTHCOMILD & COMPANY, a Corporation,
Defendants.

CLERK OF CHICAGO.

...ERK, FROM MEMORIAL

...ve. JUSTICE MACMILLAN DELIVERED THE OPINION OF THE COURT.

This case was before us on a former appeal; Notwithstanding the Griffiths, 214 Ill. App. 30. A judgment in favor of Griffiths was there reversed, this court holding, contrary to the ruling of the trial court, that the affidavit of merits presented triable issues of fact. The claim of Plaintiff is on an alleged promise contained in a building contract entered into between plaintiff and defendants, an ...ay defendants agreed to indemnify and hold plaintiff harmless from certain claims, demands, judgments, etc., as in said agreement set forth.

One Nikrboth Carter sued plaintiff in an action on the case for personal injuries sustained by her as a result of tripping on a certain crate placed in front of the elevators on one of the floors in plaintiff's store, in which defendants and their subcontractors were ...erforming work under the terms of the building contract. The plaintiff claimed the damage was wilful, under the ... the contract, defendants were bound to have plaintiff ... free, and nothing ... to de-

court the judgment was affirmed, and certiorari denied by the Supreme Court. Baxter v. Rothschild & Co., 204 Ill. App. 346. After the judgment in the indemnity suit in favor of plaintiff, Rothschild & Co., was reversed and the cause redocketed in the lower court, the plaintiff filed an amended statement of claim and defendants an amended affidavit of merits. The cause was tried by the court without a jury, and the plaintiff submitted evidence, but the defendants offered no evidence in their own behalf. At the conclusion of the evidence the defendants requested the court to find as facts that defendants were not guilty of any act of negligence alleged in the statement of claim or any statement thereof; that no act of either of the defendants or of any of their subcontractors was the proximate cause of any injuries alleged by the statement of claim or any claim thereof to have caused injuries to Elizabeth Baxter. Both of these requests were refused. Defendants also requested the court to hold as propositions of law that the evidence did not show negligence on the part of the defendants or either of them or any of their subcontractors; that the evidence was insufficient to find defendants guilty of negligence as charged, and that it failed to show that any act of the defendants or either of them or any of their subcontractors was the proximate cause of the injury alleged to have been sustained by Elizabeth Baxter. The court also refused to hold these propositions of law.

Appellants, defendants here, contend that there was no proof of any negligence on their part or on the part of any person for whom they are responsible which resulted in or caused the injury to Mrs. Baxter, and that no act of theirs or of any person for whom they are responsible was the proximate cause of the injury.

court the judgment was affirmed, and certiorari denied by the Supreme Court. Baxter v. Rothschild & Co., 234 Ill. App. 340.

After the judgment in the indemnity suit in favor of plaintiff, Rothschild & Co., was procured and the cause reopened in the lower court, the plaintiff filed an amended statement of claim and defendants an amended affidavit of merits. The cause was tried by the court without a jury, and the plaintiff submitted evidence, but the defendants offered no evidence in their own behalf. At the conclusion of the evidence the defendants requested the court to find as facts that defendants were not guilty of any act of negligence alleged in the statement of claim or any statement thereof; that no act of either of the defendants or of any of their subcontractors was the proximate cause of any injuries alleged by the statement of claim or any claim thereof to have caused injuries to Elizabeth Baxter. Both of these requests were refused. Defendants also requested the court to hold as propositions of law that the evidence did not show negligence on the part of the defendants or either of them or any of their subcontractors; that the evidence was insufficient to find defendants guilty of negligence as charged, and that it failed to show that any act of the defendants or either of them or any of their subcontractors was the proximate cause of the injury alleged to have been sustained by Elizabeth Baxter. The court also refused to hold as propositions of law, contained in the briefs here, counsel's statement that there was no proof of any negligence on their part or on the part of any person for whom they are responsible was the proximate cause of the injury to Mrs. Baxter, and that no act of theirs or of any person for whom they are responsible which resulted in or caused the

The evidence tended to show that the drop cloth was laid on the floor of plaintiff's store by the servants of defendants' subcontractor, who was at that time engaged in painting the building as required by the contract; that no one else helped to lay it; that it was an old cloth about 12' x 15' in size; that it was furnished by the subcontractor; that the purpose of laying it was to prevent paint getting on the floor; that as laid it was flat in some places on the floor and at other places wrinkled up; that the cloth was laid between 8 and 8:30 o'clock A. m., and that the accident happened between 9:30 and 10:00 a. m.; that the cloth was not changed from the time it was laid until the accident occurred; that during that time no servant of the plaintiff had anything to do with it in any way; that while it was thus laid about 500 people walked over it.

We think in view of this evidence the trial court was justified in finding not only that the defendants' subcontractor laid the cloth but maintained it up to the time of the accident. Certainly the evidence does not justify the contention of appellants that the negligence causing the injury to Mrs. Baxter "consisted solely and entirely in permitting customers of appellee to walk over this canvas and make it dangerous, after it had been properly laid."

The material parts of the contract on which plaintiff's suit was based are in the record. The contract expressly provides that appellants are to "be responsible for any injuries or accidents, however resulting from the work covered by this contract;" that they "shall indemnify and save the party of the first part, its lessors, and each and all of them, harmless from and against any and all claims for damages, injury, costs and expenses whatsoever, and however arising, to all property whatsoever and all persons whomsoever, in or about the work, caused by

The evidence tended to show that the drop cloth was laid on the floor of plaintiff's store by the servants of defendants' subcontractor, who was at that time engaged in painting the building as required by the contract; that no one else helped to lay it; that it was an old cloth about 12' x 18' in size; that it was furnished by the subcontractor; that the purpose of laying it was to prevent paint getting on the floor; that an hour it was just in some places on the floor and at other places wrinkled up; that the cloth was laid between 3 and 5:30 o'clock p. m., and that the accident happened between 5:30 and 10:00 a. m.; that the cloth was not changed from the time it was laid until the accident occurred; that during that time no servant of the plaintiff had anything to do with it in any way; that while it was just less than 500 people walked over it, certainly the evidence does not justify the conclusion of subcontractor in finding out only that the defendants' We think in view of this evidence the trial court was

"completed solely and entirely in accordance with specifications" to walk over this canvas and ask it did mean anywhere "old." Carefully the contention of appellants that the negligence consists the injury is its. Rather plaintiff's suit was based six in the record. The judgment accordingly

any negligence or any act either of omission or commission whatsoever on the part of the party of the second part or their subcontractors, in carrying out the work called for by this contract;" that "the contractor shall guard the public effectually from liability to accident in consequence of his operations during the entire progress of the work, both by day and by night, and he shall be responsible for any and all damage which may be caused through his neglect or failure to protect his employes and the public from accident."

We think that under these provisions of the contract the court might properly construe it as being in the nature of an insurance contract, and that the rulings as to propositions of fact and law requested were correct. K. C. M. etc. v. Southern Ry. News Co., 151 Mo. 373.

Appellants have quoted at length from the opinion of this court on the former appeal, and urge that the construction there put upon the contract is binding here, citing Boyle Ice Co. v. Cal. Ice Co., 194 Ill. App. 475. The decision on the former appeal is of course binding here, and the law there stated necessary to the rendering of that decision is also binding; but we do not understand that mere dicta is controlling. The question on the former appeal was whether the affidavit of merits raised an issue of fact. The contract was before us there only as stated in the pleadings, which were amended after the cause was remanded. The provisions of the contract itself are now before us, with all the evidence submitted on the issues raised by the pleadings. We think the finding and judgment of the court is correct and it will be affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

and be shall be responsible for any and all damage which may be caused through his neglect or failure to protect his employes and the public from accident."

We think that under these provisions of the contract the court might properly construe it as being in the nature of an insurance contract, and that the failure to procure insurance of the character and to the amount specified as to protection of the public from accident, R. C. M., etc. v. Jenkins Dy. Home Co., 181 Mo. App. 217.

Appellants have treated at length upon the opinion of the court on the former appeal, and urge that the construction placed upon the contract is binding here, citing Ozark Ice Co. v. Cof. Ice Co., 134 Ill. App. 419. The decision on the former appeal is of course binding here, and the law stated necessary to the resolution of that decision is also binding; but we do not understand that were right in contending. The question on the former appeal was whether the efficacy of words relied on issue of fact. The contract was before us there only as stated in the pleadings, which were amended after the cause was remanded. The evidence submitted on the issues raised by the pleadings. o trial of the contract itself are now before us, with all the construction of the court is correct and it will be affirmed.

Dwyer, P. J., and Reynolds, J., concur.

42 - 26667

JOSEPH G. KEIDEL and
KATHERINE V. KEIDEL,
Plaintiffs in Error,

vs.

H. W. COOPER, Jr.,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

223 I.A. 636

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This was an action in the trial court for forcible detainer. The facts in the case were undisputed, and at the close of the evidence the court instructed the jury to find the issues for the defendant. Judgment was entered on the finding and this writ of error is brought by the plaintiff to review the record.

A motion was made by defendant in error in this court to dismiss the writ of error for want of jurisdiction, and this motion was reserved to the hearing. The theory on which the motion was presented was that an action in forcible entry and detainer is a special statutory proceeding, and as that statute provides only one way, viz, an appeal perfected by filing a bond in five days from the entry of the judgment, by which the judgment may be reviewed, it is claimed the statute by implication excludes a review in any other way. This argument disregards the provisions of paragraph 265, section 2, chapter 37, Hurd's Revised Statutes 1919, which provide in substance that all actions in forcible entry and detainer shall be designated as actions of the fourth class; and section 23, paragraph 286 of the same statute, which provides for the review of judgments entered in fourth class actions by writ of error only. H. & A. Israelstam v. U. S. Casualty Co., 272 Ill. 161. The motion must be denied.

The facts in the case seem to be as follows: Prior to

JOSEPH O. KNIGHT and
KATHERINE V. KNIGHT,
Plaintiffs in Error,

vs.

H. V. GOOLSBY, Jr.,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE KATHERINE BOLAHAN DELIVERED THE OPINION OF THE COURT.

The facts in the case seem to be as follows: Prior to the notice of judgments entered in favor of the plaintiff in error only. [illegible] Company v. [illegible] Co., 27 Ill. App. 27, paragraph 262 of the same statute, which provides for motions must be denied.

The motion must be denied.

This was an action in the trial court for forcible detainer. The facts in the case were undisputed, and at the close of the evidence the court instructed the jury to find the issues for the defendant. Judgment was entered on the finding and this writ of error is prosecuted by the plaintiff to review the record.

A motion was made by defendant in error in this court to dismiss the writ of error for want of jurisdiction, and this motion was referred to the hearing. The theory on which the motion was presented was that an action in forcible entry and detainer is a species of tutory proceeding, and in that statute provides only one way, viz. as a bond signed together by filing a bond in two days from the entry of the judgment, or file the judgment may be reviewed. It is claimed the effect of the application excludes a review in any other way. This statement [illegible] the provisions of paragraph 265, section 2, chapter 77, Hurd's Revised Statutes 1919, which provide in substance that all actions in forcible entry and detainer shall be determined as actions of the fourth class; and section 83, paragraph 262 of the same statute, which provides for the review of judgments entered in courts of this class by writ of error only. [illegible] v. [illegible] Company Co., 27 Ill. App. 27. The motion must be denied.

April 8, 1920, one Mary D. Haskell was the owner of an apartment building situated at 7245 Coles avenue. One of these apartments was rented to the defendant, Henry W. Cooper, and he occupied the same under the lease, which was in writing and contained a covenant to the effect that the lessee should have and hold the premises "from the 15th day of January, 1919, until the 30th day of April, 1920, provided sixty days written notice is given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date, otherwise this lease, including all covenants and conditions therein shall continue from year to year until terminated by a like notice in some ensuing year. Lessor is entitled to terminate this lease upon like notice to lessee at like dates, by mailing said notice to the within mentioned premises, addressed to the lessee."

Mr. Hess was acting as Mrs. Haskell's agent. On January 21, 1920, she directed her agent to cancel this lease to Cooper, and at the same time wrote, giving the agent the names of tenants in the building. February 5th Mrs. Haskell wrote Hess, enclosing a letter which she had received from Cooper, and said that she had informed Cooper that the renting was in the hands of Hess, and asked if Cooper had been informed of the increase of rent. The said enclosed letter read as follows:

> "In reply to your letter of the 21st, I wish to advise until I looked over my check stubs on the 15th of this month, I was under the impression I had mailed you check for the January rent. I trust that you have received it by this time. I enclose check for February rent.
>
> I presume I should take up the matter of a new lease with Mr. Hess, as we will be unable to get home in time for the expiration of the old one, and Mr. Wright, who is renting from us, wishes to stay until after the school term is over. I told him that it was satisfactory to me providing you were favorable. Kindly advise me in regard to this at Hotel Stowell, Los Angeles.
>
> Thanking you in advance for a favorable reply, I am
>
> Yours truly."

April 8, 1950, one day". Maxwell was the owner of an apartment building situated at 7248 Solon Avenue. One of those apartments was rented to the defendant, Henry F. Cooper, and he occupied the same under the lease, which was in writing and contained a covenant to the effect that the lessee should pay and not let the premises from the 15th day of January, 1951, until the 15th day of April, 1950, provided sixty days written notice be given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date, otherwise this lease, including all covenants and conditions thereto shall continue from year to year until terminated by a like notice in some ensuing year. Lessor is a skilled to terminate this lease upon like notice to lessee at like notice, by mailing said notice to the [illegible] registered, addressed to the lessee."

It [illegible] a letter, [illegible] on January 27, 1950, she directed her agent to cancel this lease to Cooper, and at the same time wrote [illegible] two of tenants in the building. Shortly [illegible] Cooper, and said that she had informed Cooper that the renting was in the hands of Mead, and asked if Cooper had been influenced by the [illegible] of rent. The said enclosed letter read in [illegible]:

> "In reply to your letter of the 27th, I wish to advise that I looked over [illegible] on the 15th of this month, I was under the impression I had mailed you notice for the January rent. I think that [illegible] this time, I enclose check for January rent.
>
> I presume I should take [illegible] or [illegible] with it. Now, we will be due it to cut loose [illegible] extension of [illegible] me, [illegible] to stay until after the middle of [illegible] kindly advise me [illegible] to thank [illegible]. Thanking you in advance, [illegible]
>
> Yours truly."

To this letter Mrs. Haskell replied, granting permission to Cooper to continue to sublet to Mr. Wright, but saying nothing whatever about the renewal of the lease. Mr. Hess, upon the receipt by him from Mrs. Haskell of Cooper's letter to her, attempted to give notice to Cooper that the lessor had elected to terminate the lease. The letter was registered and forwarded to the Hotel Stowell, Los Angeles, California, but apparently Cooper had left Los Angeles, therefore the notice did not reach him and several months later it was returned to Mr. Hess. March 6th Hess & Co. received a telegram from Cooper reading as follows:

> "Mrs. Haskell advises me that you are handling her property, kindly mail me a lease to sign, Box 212, Winter Park, Florida. Will arrive there March 15th. You know I had 7245 Coles Avenue Apartment one."

Two days thereafter Hess & Co. wrote Cooper at the Florida address, stating:

> "In answer to your telegram received March 6th, in regard to the apartment at 7245 Coles avenue, will say that this building has been sold by Mrs. Haskell, and the new owner will take possession of your flat May 1st. If you will call at our office when you come to Chicago, we will try and arrange to get you an apartment."

Later Cooper returned from Florida, and there is testimony to the effect that upon his arrival he went to the office of Hess & Co. several times and made inquiries with reference to other flats; that he said he had to get out of the flat he was in and wanted Hess & Co. to find another one for him. This was about April 1st.

The plaintiffs, who brought suit, are the purchasers from Mrs. Haskell. The sole contention of the appellant is that the facts in evidence warranted the submission to the jury of the question whether Cooper had waived the notice necessary to terminate his lease, or was by his conduct estopped to assert that such notice was, in fact, given. We do not think there is any question

To this letter Mrs. Cooper replied, granting permission to Cooper to conduct to exhibit to Mr. Wright, but making nothing whatever about the renewal of the lease. Mr. Bean, upon the receipt by him from Mrs. Cooper's letter to her, attempted to give notice to Cooper that the lessor had elected to terminate the lease. The letter was registered and forwarded to the Hotel Stowell, was delivered, delivered, but unfortunately Cooper had left the Angeles, therefore the notice did not reach him and remained during [illegible] returned to Mr. Bean. Mrs. Bean [illegible] received a telegram from Cooper reading as follows:

"Mrs. Cooper [illegible] Florida. [illegible] prop-
erty, kindly wait me a week to pay, [illegible] Cooper."
Florida address, wrecking:

"In answer to your telegram received [illegible] Club, I regret to the expressed at [illegible] Country Club, will be [illegible] ing has been sold by him. Respectfully, [illegible] Bean."

Cooper [illegible] from Florida, and there [illegible] ness
of Mrs. [illegible] made inquiries [illegible] to
other [illegible] that he might be used to [illegible]
tinuity to the effect [illegible] be [illegible]
and wanted [illegible] of [illegible] April 1st.

The [illegible] or [illegible] the [illegible]
from Mrs. Cooper, [illegible] [illegible] the [illegible]
the Trade in evidence [illegible] [illegible] of the
question was: Cooper had waived the notice [illegible]
mate his lease, or was it [illegible] to [illegible]
motion was, I feel [illegible] to not think [illegible]

for the jury on these facts. No notice was given as required by the terms of the lease. The letter of Cooper to Mrs. Haskell, asking her to address him at Los Angeles on a relatively unimportant matter about a subtenant did not authorize a departure from the express provisions of the lease, which were under seal. Defendant was in possession. This amounted to notice to the plaintiffs, who purchased from Mrs. Haskell, of all the defendant's rights. Neither the mere fact that upon Cooper's return to Chicago he inquired as to other apartments, nor any of the other facts proved, amount to either waiver or estoppel, and no jury could reasonably so find. Winnesheik Ins. Co. v. Schueller, 60 Ill. 470; Knickerbocker v. Gould, 80 Ill. 328; Bay State Bank v. Kiley, 14 Gray, Mass. 492.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

for the jury on these facts. No notice can given as required by the terms of the lease. The letter of Cooper to Im. Haskell, pointing her to matters like at Los Angeles in a relatively minor portant matter never a document did not authorize a departure from the express provisions of the lease, which were under heel. Defendant was in possession. This amounted to notice to the plaintiffs, who purchased from Mrs. Haskell, of all the defendant's rights. Neither the mere fact that upon Cooper's return to Chicago he inquired as to other apartments, nor any of the other facts proved, amount to waiver or estoppel, and so they could reasonably do find. Atkinson Imp. Co. v. Edmundson, 40 Ill. 470; Mercer Beaver v. Young, 80 Ill. 538; Bay State Gas v. Kline, 14 Fed. Rep. 492.

The judgment is affirmed.

Mr. J. J. Hoy for plaintiff in error, cited

Mayer, P. J., Hoy for defendant in error, cited

52 - 26695

A. K. BRENCH,
Appellee,

vs.

FRANK BARROW, THOMAS ANDERSON, Jr., and WILLIAM J. CROWLEY,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

223 I.A. 636

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellee, who was complainant below, filed an amended bill of complaint against appellants, Frank Barrow, Thomas Anderson, Jr., William J. Crowley, The Chicago Motor Delivery Company and the Union Trust Company, in which it alleged that on June 25, 1915, the Motor Company had an outstanding capital stock of the par value of $5,000, divided into 100 shares of $50 each; that one William MacDougall on that date induced complainant and defendant Barrow to join him in purchasing said stock, and to that end made certain false and fraudulent representations as to the financial condition of said corporation; that relying on the same the purchase was made and the stock thereupon reissued, 34 shares to Barrow, 33 shares to MacDougall and 33 shares to complainant; that upon discovering the falsity of the representations of Mr. MacDougall it was sought to compel him to make good these losses and that he disappeared; that George H. White, an attorney, was employed in that behalf, but without avail; that believing that MacDougall had thus forfeited all his right and claim to any stock of the corporation, they sought to locate him in order to institute "legal proceedings" to the end that a surrender or cancellation of the MacDougall stock might be enforced; that thereafter until June 25, 1919, complainant and Barrow carried on the business of the corporation as if the interest of MacDougall therein had been forfeited and the stock owned by complainant and Barrow in equal

32 - 26008

V. M. MACBOZ,

Appellee,

vs.

MARK MILLER 1, CHARLES [illegible], &c.,
and MILLER 1, CHARLES
Appellants.

ERROR FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Appellee, who was complainant below, filed an amended bill of complaint against appellants, Mark Barton, Thomas Vanderbeek, 2d., William J. Crowley, the Chicago Motor Delivery Company and the Union Trust Company, to which it elected not to plead, on June 25, 1919, the Motor Company had an outstanding capital stock of the par value of $5,000, divided into 100 shares of $50 each; that one William Macdonell on that date issued promissory notes to Vanderbeek Barton to join him in purchasing said stock, and in that way made certain false and fraudulent representations as to the financial condition of said corporation; that, relying on the same the purchase was made and the stock transferred, 24 shares to Barton, 23 shares to Vanderbeek and 25 shares to complainant; that upon discovering the falsity of the representations of Macdonell it was thought to compel him to make good those losses and that he disappeared; that George F. Miller, an attorney, was employed in that behalf, and attempted by legal action to recover the corporation, they so put to [illegible] or to institute Donnell had thus [illegible] [illegible] stock of [illegible] in that behalf, and attempted by; that all the [illegible]

amounts; that about the time of MacDougall's disappearance Barrow transferred one of his shares of stock to George H. White; that complainant and Barrow continued until June 28, 1919, to give all their time to the business of the corporation as if the same were a copartnership; that no dividends were paid, but the profits were divided as salaries in equal amounts; that complainant, White and Barrow constituted the Board of Directors; that all debts were paid and the corporation prospered; that at a meeting held June 22, 1918, Barrow was commissioned in behalf of the corporation to find MacDougall and obtain a release and surrender of the stock held by him; that Barrow found him and secured the said stock and a release of all claims of the corporation against MacDougall upon the payment of $150; that he drew $150 from the funds of the corporation and paid the same to MacDougall; that Barrow, acting fraudulently, took the assignment of said shares in blank and afterwards demanded the issue of the stock to himself, which complainant, as secretary of the company, refused to do; that thereafter, by a certain instrument in writing dated June 20, 1919, Barrow attempted to assign six shares of this stock to defendant Thomas Anderson, Jr., an employe of the Union Trust Company, and six shares to defendant William J. Crowley; that at the annual meeting of the company held on June 28, 1919, Anderson and Crowley appeared and claimed the right to vote the stock, and that Barrow fraudulently sought to have the same voted and sought to vote 21 shares of the stock obtained from MacDougall in his own name; that Barrow was chairman of the meeting and fraudulently announced that the directors for the coming year elected were Barrow, Anderson, Jr., and complainant; that as a matter of fact George H. White was at said time duly elected as a director and not Anderson, but that Barrow, counting the MacDougall stock, re-

not Anderson, but that Barron, counsel for the Wall Hall stock, re-
George H. White was at said time duly elected as a director and
row, Anderson, Jr., and complainant; that as a matter of fact
nounced that the directors for the coming year elected were Bar-
that Barron was entitled to vote said 22 shares of the said com-
pany; that at the said meeting complainant was duly authorized
and claimed the right to vote the stock, and that Barron
company held on June 28, 1915, whereupon said Barron attempted
defendant William J. Crowley; that at two annual meetings of the
stockholders of the Luton Trust Company, who pledged to
certificate of said stock to defendant Thomas Anderson,
sundry six shares of the Luton Trust Company, who pledged to
investment in writing dated June 2, 1915, Barron attempted to
of the company, refused to do; that thereafter, on a certain
issue of the stock to himself, which complainant, as secretary
statement of said shares in block and otherwise demanded the
to Crowley; that Barron, acting fraudulently, took the ma-
chine $150 from the funds of the corporation and paid the same
portion against Crowley upon the payment of $1.0; that he
secured the said stock was a release of all claims of the cor-
surrender of the stock held by him; that Barron took him and
of the corporation to that Crowley; and obtain a release and
a meeting held June 22, 1915, Barron was commissioned in behalf
that all debts were paid and a corporation promptered; that at
plainant, White and Barron constituted the board of Directors;
the profits were divided as amounts in equal amounts; that com-
the same were a copartnership but no dividends were paid, but
give all their time to the business of the corporation as it
that complainant and Barron continued until June 22, 1916, to
row transferred one of his shares of stock to Doorne J. White;
amounts; that about the time of Crowley's disappearance Bar-

fused to recognize the election of White and afterwards pretended to organize the Board of Directors as himself, Anderson, Jr., and complainant, and immediately after the meeting pretended to discharge complainant from the service of the corporation, ordered complainant from the premises, refused him information about the affairs of the corporation; and that Barrow is in possession of the corporation as a result of fraud and personal violence threatened.

The amended bill prayed an answer, but not under oath; that Barrow should be decreed to hold 32 shares of stock, released and surrendered by MacDougall in trust for the benefit of the corporation, the Motor Company; that he, Barrow, be directed to surrender the certificate representing such shares; that the pretended assignments of stock to Crowley and Anderson should be set aside; that Crowley and Anderson should be enjoined from pretending to be stockholders or from acting as officers of the corporation; that the pretended election of Anderson as a director should be set aside, and complainant, Barrow and White declared the duly elected directors; that complainant should be restored to the office of secretary and treasurer of the corporation, and Barrow enjoined from paying out the money or funds of the corporation, and from interfering with complainant in his rights and duties as secretary and treasurer, etc. The bill also prayed for general relief.

Defendants answered denying the alleged false representations and denying all the material facts alleged in the bill. Replication was filed and the cause was referred to a master in chancery to take the evidence and report. The master took the evidence and reported that the complainant had failed to prove the material allegations of his bill of complaint; that

to prove the material allegations of his bill of complaint; that took the action and refused that the complainant had failed master in chancery to take the evidence and report. The under- reservation was filed and the cause was ordered to be set for hearing on the material facts as set forth in the bill. Application was made by the defendants (who are hereinafter referred to as the Barrow defendants) for leave to file a cross bill against the complainant, Treasurer, etc. The bill also prayed for general relief. The cross bill charged in substance that the complainant, with the money or funds of the corporation, had purchased the stock of the corporation, the Motor Company; that he, Barrow, became of the corporation, the Motor Company; that he, Barrow, be directed to surrender the certificate representing such shares; that the pretended salvage of stock to Crosby and Anderson should be set aside; that Crosby and Anderson should be enjoined from pretending to be stockholders or from voting as officers of the corporation; that the pretended election of Anderson as director should be set aside; that the pretended election of Barrow and White declared to be of void effect; that cer- plainant should be restored to the office of Treasurer of the corporation, or words of similar import. The cross bill was filed on the 19th day of February, 1917, and on the 20th day of February, 1917, the complainant filed his answer to the cross bill, and thereupon the cause was referred to a master in chancery to take the evidence and report. The under- stood the action and believed that the complainant had failed to prove the material allegations of his bill of complaint; that

the same were not sustained by the evidence; that the equities of the cause were with the defendants and against the complainant, and that the complainant was not entitled to the relief prayed for. He recommended that a decree be entered dismissing the bill of complaint at complainant's costs for want of equity.

The complainant filed objections to the master's report, which were overruled, and these objections upon the hearing before the chancellor were ordered to stand as exceptions. The chancellor sustained the exceptions of the complainant in part and entered the decree from which this appeal is taken.

The decree finds that each and all of the material allegations of the bill of complaint were proved; that the equities of the cause were with the complainant; that the defendant, the Chicago Motor Delivery Co., was a corporation organized and doing business under and by virtue of the laws of the State of Illinois; that an authorized capital stock of $10,000 was divided into 200 shares of the par value of $50 each, of which only 100 shares have been issued; that on or about June 25, 1915, the outstanding and issued capital stock of the said Chicago Motor Delivery Co., consisting of 100 shares, were purchased by the complainant, A. H. Breese, the defendant, Frank Barrow, and one William MacDougall, from one George Hollandsworth, who was then the owner thereof; that the funds for the purchasing of said shares of stock, amounting to $2500, were furnished by the defendant, Frank Barrow; that upon the purchase of said 100 shares of stock one certificate for 34 shares was issued by said corporation to said defendant Frank Barrow, and one certificate for 33 shares was issued by said corporation to the complainant, A. H. Breese, and one certificate for 33 shares, being certificate No. 5, was issued by said corporation to said William MacDougall; that contemporaneously with the purchase of said stock from said Hol-

complaint at complainant's cost for want of equity.

The complainant filed objections to the master's report, which were overruled, and these objections upon the hearing before the chancellor were ordered to stand as exceptions. The chancellor sustained the exceptions of the complainant in part and entered the decree from which this appeal is taken.

The decree finds that each and all of the material allegations of the bill of complaint were proved; that the circumstances of the cause were such as complainant, that the defendant, the Chicago Motor Delivery Co., was a corporation organized and doing business under and by virtue of the laws of the State of Illinois; that an authorized capital stock of $10,000 was divided into 200 shares of the par value of $50 each, of which only 100 shares have been issued; that on or about June 28, 1913, the outstanding and issued capital stock of the said Chicago Motor Delivery Co., consisting of 100 shares, were purchased by the complainant, C. K. Spence, Eric Johnson, Frank Mercer, and one William Hackmann, from one Sandro Scimmarotti, who was then the owner thereof; that the funds for the purchasing of said shares of stock, amounting to $9,500, were furnished by the defendant, Frank Burns; that upon the issuance of said 100 shares, one certificate for 34 shares was issued to said defendant Frank Burns, and one certificate for 33 shares, and one certificate for 33 shares, being certificate No. 3, was issued by said corporation to said Eric Johnson; that counterpreviously with the purchase of said stock from said Scimmarotti

landsworth and the issuance of said shares of stock, said A. H. Breese, said Frank Barrow and said William MacDougall entered into the following written agreement:

"Chicago, June 23rd, 1915.

We, the undersigned, hereby agree as follows: First, the capital stock of the Chicago Motor Delivery Co, which is now issued, shall be divided as follows: Thirty-four shares to Frank Barrow, Thirty-three shares to A. H. Breese, Thirty-three shares to William H. MacDougall; Second, all of the above stock to be held in trust by Frank Barrow, who shall have the right to all the dividends paid on same until he shall have received in cash dividends the sum of $2,500, at which time the stock shall be returned to its owners, as stipulated above; Third, during the life of this trust agreement William MacDougall, as president, shall receive a salary of $40 per week, A. H. Breese, as vice-president, shall receive a salary of $30 per week, and Frank Barrow, as secretary, shall receive a salary of $32.50 per week. Fourth, we agree each with the other, to look after our respective duties diligently, and to work together for one single purpose and make the business successful.

In witness whereof, we have hereunto set our hands and seals at Chicago, Illinois, this 25th day of June, A. D. 1915;"

that said stock certificates issued to said A. H. Barrow and said William MacDougall were upon the execution of said agreement delivered to and held by said Frank Barrow, in conformity with said agreement, but without being endorsed or assigned in blank or otherwise by either of said parties; that in the month of August or September, 1915, said William MacDougall abandoned and severed his connection with the said Chicago Motor Delivery Co. and did not at any time thereafter work with or contribute to the carrying on of the business of said corporation, or in any manner perform or attempt to perform the agreement entered into by him, as herein above set forth; that after said William MacDougall abandoned and severed his connection with the business of said Chicago Motor Delivery Co. complainant and defendant Frank Barrow managed, conducted and carried on the business; that shortly after MacDougall abandoned said business complainant and defendant entered into an oral agreement with each other that the profits earned by said corporation should be divided equally between them, and that when defendant Barrow had received from the profits of said corporation the sum of $2500, together with interest thereon, which he had ad-

Jamesworth and the issuance of said shares of stock, said W. H. Breese, said Frank Barrow and said William MacDougall entered into the following written agreement:

"Chicago, June 23rd, 1910.

We, the undersigned, hereby agree as follows: First, the capital stock of the Quincy Motor Delivery Co. which is now issued, shall be divided as follows: Thirty-four shares to Frank Barrow, Thirty-five shares to W. H. Breese, Thirty-three shares to William K. MacDougall; second, all of the above stock to be held in trust by Frank Barrow, who shall have the right to all the dividends paid on same until he shall have received in cash dividends the sum of $2,500, at which time the stock shall be returned to the owners, as stipulated above; Third, during the life of this trust agreement William MacDougall, as president, shall receive a salary of $40 per week, W. H. Breese, as vice-president, shall receive a salary of $30 per week, and Frank Barrow, as secretary, shall receive a salary of $25.50 per week. Fourth, we agree each with the other, to look after our respective duties diligently, and to work together for one single purpose and make the business successful.

In witness whereof, we have hereunto set our hands and seals at Chicago, Illinois, this 23rd day of June, A. D. 1910;"

that said stock certificates issued to said W. H. Breese and said William MacDougall were upon the execution of said agreement delivered to said Frank Barrow, in accordance with said agreement, but without being endorsed in blank by said Frank Barrow, in accordance with said agreement, but without being endorsed in blank or otherwise by either of said parties; that in the month of January or September, 1910, said William MacDougall borrowed and received the sum of $2500, together with interest thereon, which he had advanced Barrow had received from the profits of said corporation, which corporation should be divided equally between them, and that upon said agreement with said Barrow. Each received other sums

or at any time thereafter work at or contribute in time carrying on of the business of said car corporation, or to any manner offered his connection with the said Co. save Quincy Delivery Co. and did or attempt to perform the agreement entered into by him, in terms above set forth; that after said William MacDougall had died and

Delivery Co. complainant and defendant Frank Barrow owned, conducted and carried on the business; that shortly thereafter said William MacDougall departed this life, leaving as heirs at law his widow and children, who became interested with said Frank Barrow in the business of said corporation, and that upon

vanced for the purchase of the outstanding 100 shares of stock, the stock and business of the corporation should be considered as owned by them jointly, in equal proportions; that in pursuance of said agreement defendant Barrow was paid from the funds of the corporation the sum of $2715, being the amount of said sum of $2500 with interest, which had been advanced for the purchase of the outstanding 100 shares of stock of the corporation; that the final payment of said sum was made to Barrow on or about July 7, 1917; that in pursuance of the oral agreement the profits of the corporation were equally divided between Breese and Barrow up to June 28, 1919, with the exception that half of the said sum of $2715 which was paid was deducted from the share of Breese in the profits of the corporation, and the other half charged to the account of Barrow; that after Barrow had been paid said sum, the stock certificate theretofore issued to Breese for 33 shares of stock in the corporation was delivered by Barrow to Breese; that the certificate No. 5 for 33 shares of stock theretofore issued in the name of William MacDougall was held in the custody of Barrow; that the matter of securing an assignment and relinquishment by MacDougall of his rights and interest in said certificate was the subject of frequent discussion between Breese, Barrow and George H. White, who constituted the Board of Directors of the corporation; that immediately following the annual meeting of the stockholders on June 22, 1918, the matter was discussed by them, and thereupon Barrow undertook to find MacDougall and endeavor to secure an assignment and relinquishment of his interest in the stock certificate; that on about July 1, 1918, Barrow secured from MacDougall a written assignment to himself of this stock certificate and paid therefor the sum of $150, with a check drawn on the funds of the corporation, which were later charged to Barrow's personal account; that thereupon Barrow claimed these shares of stock be-

account; that Shenandoah Barrow signed three shares of stock personal of the corporation, which were later endorsed to Barrow's personal and paid therefor the sum of $10., with a check drawn on the funds Shenandoah Barrow written authorizing to fill of this stock certificate stock certificate; that on about July 1, 1917, Barrow secured from secure an assignment and retransfer of his interest in the one Sheridan Barrow authorizing to fill Shenandoah and endeavor to exchange on June 23, 1919, the matter was discussed by them, corporation; that immediately following the annual meeting of the George I. Shire, who constituted the Board of Directors of the the employer of respondent discussion between Barrow, Barrow and Shenandoah of his stock and business of the outstanding 100 shares of stock, vanced for the purchase of the outstanding 100 shares of stock, $3500 with interest, which had been advanced for the purposes of the corporation; that the total amount of said sum of $3517; being the amount of said sum of the final payment of said sum was made to Barrow on or about July 7, 1917; that in pursuance of the oral agreement the profits of the corporation were equally divided between Breese and Barrow up to June 26, 1919, with the exception that half of the said sum of $3517 which was paid was received from the share of Breese in the profits of the corporation, and the other half charged to the account of Barrow; that after Breese had been paid said sum, the stock certificate theretofore issued to Breese for 99 shares of the certificate No. 3 for 99 shares of stock theretofore issued stock in the corporation was witnessed by Barrow to Breese; that in the name of William Duncanfelt was held in the custody of Barrow; that the matter of securing an assignment and re-indorsement by Respondent of his stock and interest in said certificate was by Barrow and Breese; that Barrow did not deliver the said certificate

longed to him individually; that thereafter until the annual meeting of the stockholders held on or about June 28, 1919, the profits of the corporation were equally divided between Barrow and Breese; that the certificate No. 5 is still in the possession of defendant Barrow, has not been surrendered or cancelled, nor any other certificate issued in lieu of the same; that on June 20, 1919, Barrow pretended to assign six shares of this stock to defendant Anderson, Jr. and six shares to defendant Crowley; that neither of said defendants appeared to testify on the hearing and no proof was offered in support of the pretended assignments; that neither of them were stockholders in the corporation on the day of the annual meeting held on or about June 28, 1919, nor qualified under the by-laws to serve as a director or officer; that the purported election of directors and officers at the stockholders and directors meetings of June 28, 1919, were null and void; that Breese, Barrow and White were duly elected directors and duly qualified and acted as such directors up to June 28, 1919; that at the annual meeting of the board of directors held June 22, 1918, following the annual stockholders meeting, Barrow was chosen president and Breese secretary and treasurer, and duly qualified, and acted up to June 28, 1919; that by reason of the nullity of the stockholders and directors meeting held June 28, 1919, Breese, Barrow and White have ever since been and now are the directors of the corporation, Barrow the president and Breese the secretary and treasurer; that the certificate No. 5 and the 33 shares represented thereby were at the date of the filing of the complainant's bill of complaint and now are the property of complainant A. H. Breese and Frank Barrow in equal proportions; that it should be surrendered to the Chicago Motor Delivery Co. and cancelled, and in place thereof new certificates for 16½ shares should be issued to Breese and Barrow respectively; that Breese should reimburse Barrow for half

Burton respectively; that George Whaley cast three votes for
of one certificate for the share standing to [illegible] and
to the Citizens Water Company Co. [illegible], and [illegible]
and Frank Perkin in favor thereof, and [illegible] opposed
of ownership and not the Citizens Water Company [illegible];
thereby vote at the date of the filing of the [illegible]'s bill
thereof; that the certificate No. [illegible] and the [illegible]
to the Citizens Water Company Co. [illegible], and [illegible]
of one certificate for the share standing to [illegible] and
Burton respectively; that George Whaley cast three votes for
leased in support of the recorded assignment; that neither
leased appeared to testify on the hearing and no proof was of-
1x. and his spouse to defendant Crowley; that neither of said de-
pledged to secure six shares of this stock to defendant Anderson,
stockse issued in lieu of the same; that on June 3d, 1913, Burton
Burton, has not been surrendered or cancelled, nor any other cer-
that the certificate No. 3 is still in the possession of defendant
of the corporation two equally divided between Burton and Jessop;
ing of the stockholders held on or about June 3d, 1913, the profits
longed to him individually; that thereafter until the annual meet-

of said sum of $150 expended by him in securing an assignment from MacDougall.

Upon this finding of facts it was decreed that Barrow forthwith deliver up to the secretary of the corporation certificate No. 5 for 33 shares of stock; that the secretary of the corporation should forthwith cancel the certificate, and the president and secretary issue new certificates to Barrow for 16½ shares; that Anderson, Jr., should be perpetually enjoined and restrained from asserting any claim to the office of director in the corporation, and that Barrow should be perpetually enjoined and restrained from asserting any claim to the office of treasurer; that Anderson and Crowley and each of them should be perpetually enjoined from interfering with the management of the property or affairs of the corporation, and were enjoined and commanded to turn over forthwith the business, property and affairs of the corporation to Breese, Barrow and White.

Appellants contend that there is no proof in the record tending to show that appellant Barrow ever received the $2500 which by the terms of the terms of the trust agreement was to be paid to him, and therefore argue that at the beginning of this suit the shares of stock described in the trust agreement were still held in trust, and appellant the legal owner thereof. This is directly contrary to the findings not only of the decree, but also to the report of the master, which says "that the business of the company prospered to such an extent that by July 9, 1917, defendant Frank Barrow had been reimbursed from the net earnings of the company in an amount equal to his original investment, together with interest at 5 per cent; this reimbursement having been made out of the salaries credited to himself and Breese.

of said sum of $750 expended by him in securing on assignment from Macdonnell.

Upon this finding of facts it was decreed that Barrow pay to the executrix of the succession of the corporation certificate No. 3 for 35 shares of stock; that the secretary of the corporation should forthwith cancel the certificate, and the president and secretary issue new certificates to Barrow for 19½ shares; that Anderson, Jr., should be perpetually enjoined and restrained from assuming any claim to the office of director in the corporation, and that Barrow should be perpetually enjoined and restrained from executing any claim to the office of treasurer; that Anderson and Crowley and each of them should be perpetually enjoined from interfering with the management of the property or affairs of the corporation, and were enjoined and commanded to turn over Forsmith Barrow and Wyche.

Appellants contend that there is no proof in the record tending to show that objection Barrow ever received the $2500 the business, property and affairs of the corporation to Barrow, made out of the moneys advanced to Forsmith and Crowley. Barrow testified that the moneys advanced by him in securing an assignment from Macdonnell of $750 were borrowed by him at 3 per cent; this corroboration having been of the company in no amount edged to pin originally borrowed, to- redeem Frank Barrow had been subjected from the net securities the company borrowed to such an extent that by July 9, 1914, the size to the report of the master, which says "that the omission of the item of $2500 is directly contrary to the findings not only of the court, but will hold in trust, and reinstate the joint bank account. This suit the shares of stock described in the first agreement were paid to him, and therefore there is the petitioning of this amiss by the terms of the first agreement was to be and tending to show that objection Barrow ever received the $2500

We think that finding is sustained by the evidence. The controlling issue of fact in the case is whether appellant purchased the MacDougall stock for himself and so holds it, as he contends, and the master found, or whether he purchased the same under circumstances such as would impress a trust upon it, as the bill alleges and the decree finds. Appellants have not argued that this finding is against the preponderance of the evidence, and we would have to so find in order to justify us in setting it aside. But appellants contend that the allegations of the bill in this respect do not correspond with the proof and the decree, citing Wilson v. Wilson, 268 Ill. 270. It is claimed that the bill, decree and proof do not correspond in that the bill alleges that the stock was purchased by Barrow by and on behalf of the corporation, whereas the evidence establishes, as appellant contends, that he purchased it in his own right, and the decree finds that it was purchased by Breese and Barrow jointly in equal proportions. We do not thin k that this contention can be sustained on the facts. It is true the relief given by the decree was different from that specially prayed for by the bill, but the amended bill contained a prayer for general relief, and the rule in such case is that the complainant may have such relief as he is entitled to under the allegations of fact contained in the bill and the proof made in support thereof. Van Zanten v. Van Zanten, 269 Ill. 491; Gibbs v. Davis, 168 Ill. 205. As is said in A. T. & S. F. RY. Co. v. Stamp, 290 Ill. 428, "A general prayer for relief is sufficient to support any decree warranted by the facts alleged in the bill and established by the evidence." We do not think the allegations of the amended bill in this case and the proofs are inconsistent with each other or with the decree. Equity regards the substance of things, not the form merely; and while it is true that the amended bill al-

the term merely; and while it is true that the modified bill differs with the decree. Public recognition of things, not in this case and the people are inconsistent with any other or evidence." We do not think the objections of the amended bill warranted by the facts stated in the bill and established by the "A general prayer for relief is sufficient to support any decree 808. As it said in A. & N. R. Co. v. Kinney, 826 111. 476, Van Deusen v. Van Antwerp, 269 111. 401; Iglehe v. Davis, 168 111. fact contained in the bill and the proof made in support thereof. have such relief as he is entitled to under the allegations of for by the bill, but the amended bill contained a prayer for general relief, and the rule in such cases is that the complainant may relief given by the decree was different from that specially prayed that this conclusion can be sustained on the facts. It is true the by Reese and Barrow jointly in equal proportions. We do not think k it in his own right, and the decree finds that it was purchased the evidence establishes, as he claims contends, that he purchased purchased by Barrow by and on behalf of the corporation, whereas proof do not corresponding in that the bill alleges that the stock was Allison, 268 111. 270. It is claimed that the bill, decree and do not corresponding with the proof and the decree, citing Allison v. applicants contend that the allegations of the bill in this respect have to be find in order to justify us in setting it aside. But finding in support the preponderance of the evidence, and we would allegee and the decree finds. Appellants have not argued that this circumstances such as would impress a trust upon it, no the bill tends, and the master found, or whether be purchased the same under chased the MacDougall estate for himself and so holds it, as be con- The controlling issue of fact in the case is whether appellant pur-

We think that finding is sustained by the evidence.

leges that the MacDougall stock was purchased by Barrow for and on behalf of the Motor corporation and with its funds, it also alleged that after the disappearance of MacDougall the business of the corporation was carried on by Breese and Barrow the same as if the MacDougall stock had been cancelled and forfeited "and all the outstanding stock of said corporation held and owned by your orator and said Frank Barrow in equal amounts." In the fourth paragraph of the amended bill it is alleged, "that it was understood and agreed, and since the date of the disappearance of said William MacDougall it has been understood and agreed by and between said Frank Barrow and your orator, that the said Frank Barrow and your orator owned equal interests in said Chicago Motor Delivery Company." The proofs abundantly sustain these allegations, and it thus becomes wholly immaterial as between the parties to this suit whether the corporation should be held to be entitled to the MacDougall stock, or Barrow and Breese jointly entitled to it. There is therefore, we think, substantial correspondence between the amended bill, the proofs and the decree.

It is next contended that the decree is erroneous as to Anderson and Crowley. It is said that even according to the findings of the decree, Barrow had 16½ shares of the MacDougall stock, and therefore a lawful and valid right to transfer that amount of stock to each of them. It is said that no one disputes the fact that they were given the stock; that it is claimed in the amended bill, admitted in the answer and testified to by the witnesses. This is hardly accurate. The amended bill alleges "a pretended assignment" of this stock by Barrow to these two parties. The evidence showed that MacDougall's certificate was in the hands of Barrow; the alleged assignments to Anderson and Crowley were not offered in evidence; neither Anderson nor Crowley testified;

not cleared it evidence; neither Vosburgh nor Conway appeared; of Benson; the writers enthusiasm to Vosburgh at Conway were The eighteen pound iron anchor originally in the bank fireplace mantel" of this story by Benton to show the writer. ever, and therefore a fairly hot voice might be forgiven that amount of stock to deal in there. It is said that no distribu- the last time they were taken by Wood; why it is stated in the unsold gift, equalled it; the number and applied to by the sit- uations. This is pretty accurate. The real gift stands "a Limings of the dance, Benton had left stocks at the beginning so to Vaseman and Dreatoy. It is said that when according to the

It is next concerned that the issues in accordance vondence between the awarded gift, the people and the doctor. ciated to it. There is therefore, no trick, materially contra- entitled to the Wadsworth stock, or Burton and Brown jointly en- parties to this suit whether the corporation should be held to be Jenkins', and it thus becomes chiefly important as between the Motor Delivery Company." The proofs absolutely sustain these Irwin Barnum and John Tabor owned equal interests in said Chicago by and between said Irwin Barnum and Tabor, that the said ance of said Utility Wadsworth it was been understood and entered was understood and agreed, and since the date of the disposi- Temple Partnership of the completed gift it is alleged, "that it Tabor erator and said Frank Barnum in equal amounts." In the all the outstanding stock of said corporation held and owned by as if the Wadsworth stock had been cancelled and retained "and of the corporation was carried on by Barnum and Barton the same alleged that after the disappearance of Wadsworth the business on behalf of the Motor corporation and with the funds, it also takes that the Wadsworth stock was purchased by Barnum for and

there is no proof that they ever became stockholders of record; and only such, according to the by-laws, had a right to vote at the annual meeting. Crowley and Anderson have asked no relief in these proceedings, and we think the decree is not erroneous as to them.

It is next contended that the decree should not have been entered in favor of Breese, because, it is said, he comes into court with unclean hands. This suggestion is based on the findings to the effect that after MacDougall disappeared it was complainant who suggested that without paying dividends the salaries of Barrow and himself should be increased in such a way as to get the profits earned by the corporation. This, it is urged, is a fraud which would prevent a decree in his favor. If it were held to be a fraud, Barrow participated in it; but we do not think the maxim of equity on which appellants rely has any application here. In the first place because the evidence fails to establish any fraud against MacDougall, but rather tends to indicate that MacDougall attempted to defraud both Breese and Barrow, but also because the fraud claimed is not with respect to the very matter concerning which the amended bill prays for relief. Halloran v. Halloran, 137 Ill., 100; Chicago v. Stock Yards Co., 164 Ill. 236.

The decree is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

there is no proof that they ever become stockholders of record; and only such, according to the by-laws, had a right to vote at the annual meeting. Cromley and Anderson have asked no relief in these proceedings, and we think the decree is not erroneous as to them.

It is next contended that the decree should not have been entered in favor of Shaw, because, it is said, he comes into court with unclean hands. This contention is based on the findings to the effect that after [illegible] stock carried it was complainant who suggested that without a plan [illegible] the affairs of Dexter and Kenwell should be incorporated in such a way as to get the profits derived by the [illegible]. This, it is argued, is a fraud which would prevent a decree in his favor. It were quite to be a fraud, were it established; but we do not think the remark of [illegible] justifies any application here. In the first place because the evidence fails to [illegible] any fraud whatever. Secondly, but rather tends to indicate that [illegible] to effect Dexter, Kenwell & Co. with [illegible] Barton, but also because the [illegible] to the very moment of [illegible] for [illegible] relief. Dewhirst v. Pennsylvania, 124 [illegible]; Holmes v. Cook Yards Co., 184 Ill. 441.

The decree is affirmed.

Dever, C. J., not [illegible].

86 - 26740

M. J. BARNICLE and JOHN BARNICLE,
Trading as Barnicle Bros.,
Plaintiffs in Error,

vs.

SIMON FISH,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

223 I.A. 636

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

May 8, 1916, the plaintiffs below, who are plaintiffs in error here, filed a declaration against the defendant charging the utterance of false and slanderous words by defendant of and concerning the plaintiffs. The defendant filed a plea of "Not guilty." March 11, 1918, plaintiffs, by leave given, filed an amendment to the declaration, and to this declaration as amended defendant pleaded the general issue and filed a further plea of the Statute of Limitations, which plea alleged that the original declaration did not state a cause of action. To this plea plaintiffs filed a replication, to which defendant demurred, and on April 27, 1918, on motion of the attorney for defendant, the demurrer was carried back to the declaration as amended, and sustained, and leave was given to file an amended declaration in ten days.

September 16, 1919, on motion of defendant's attorney it was ordered that the suit be dismissed for want of compliance with the rule to file an amended declaration. October 18, 1919, plaintiffs entered a motion to set aside and vacate the order of dismissal entered September 16th, and this motion was continued. December 13, 1919, on motion of the attorney for defendant, plaintiffs were ruled to file an amended declaration in five days, and in default thereof the cause should stand dismissed at plaintiffs' costs, notice of the rule to be served on plaintiffs by registered

M. J. DARMICIA and JOHN MARMICIA,
Trading as Bermuda Shoe..
Plaintiffs in Error,

vs.

SIMON ZIEM,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE WATCHORN DELIVERED THE OPINION OF THE COURT.

May 8, 1918, the plaintiffs below, who are plaintiffs in error here, filed a declaration against the defendant charging the utterance of libelous and slanderous words by defendant of and concerning the plaintiffs. The defendant filed a plea of "Not Guilty." March 11, 1919, plaintiffs, by leave given, filed an amendment to the declaration, and to this declaration as amended defendant pleaded two several issues and filed a further plea of the statute of limitations, which plea alleged that the original declaration did not state a cause of action. To this plea plaintiffs filed a replication, to which defendant demurred, and on April 27, 1919, on motion of the attorney for defendant, the demurrer was carried back to the declaration as amended, and leave was given to file an amended declaration in ten days.

September 16, 1919, on motion of [illegible] attorney it was ordered that the suit be dismissed for want of compliance with the rule to file an amended declaration. October 10, 1919, plaintiffs entered a motion to set aside said order of dismissal, entered September 16th, and this motion was continued. December 12, 1919, on motion of the attorney for defendant, plaintiffs were ruled to file an amended declaration in ten days, and in default thereof the cause should stand dismissed at plaintiffs' costs, notice of the rule to be served on plaintiffs by registered

mail. December 18, 1919, plaintiffs filed a second amended declaration, to which defendant filed a general demurrer. June 19, 1920, on motion of attorneys for defendant, "the objection of the defendant to the further consideration of this cause as a pending cause, being now here considered, it is ordered that said objection to the further consideration of this cause be and the same is hereby sustained for non-compliance with the order of April 27th, 1918, to which ruling plaintiffs except. And the cause stands dismissed for non-compliance with said order of April 27th, 1918, and that the defendant have and recover his costs herein of and from the plaintiffs, and that he have execution therefor."

It appears from the bill of exceptions that the order of September 16, 1919, was entered upon a general call of the docket, and with the proviso that defendant should notify plaintiffs of the action in the court; that plaintiffs were so notified; that the attorney for plaintiffs then presented to attorney for defendant a stipulation to reinstate the cause, and set it for trial November 20th; that the attorney for the defendant crossed out the words of stipulation and wrote thereon, "Defendant does not object to the entry and allowance of the above motion, but moves to dismiss said cause for failure to comply with the rule or leave to amend granted plaintiffs;" and that he therefore gave notice that he would call the motion up for disposition December 5, 1919, at the opening of court; that counsel for defendants wrote plaintiffs' attorneys on December 13, 1919, notifying them of the rule to file a declaration within five days; that said notice was then sent by registered mail, and that the order entered by the court on that date was in the handwriting of defendant's attorney.

defendant's attorney.

entered by the court on that date was in the handwriting of defendant's attorney, and that the order said notice was then sent by registered mail, and that the order [illegible] defendant filed a general demurrer. June 19, 1920, on motion of attorney for defendant, "the objection of the defendant to the further consideration of this cause as a pending cause, being now here considered, it is ordered that said objection to the further consideration of this cause be and the same is hereby sustained for non-compliance with the order of April 27th, 1918, to which ruling plaintiff except. And the cause stands dismissed for non-compliance with said order of April 27th, 1918, and that the defendant have and recover his costs therefor."

It appears from the bill of exceptions that the order of September 16, 1919, was entered upon a general call of the docket, and with the proviso that defendant should notify plaintiff of the motion in the cause; that plaintiff were no notified; that the attorney for [illegible] then presented to attorney for defendant a stipulation to vacate the order, and set it for trial November 20th; that the attorney for the defendant crossed out the words of stipulation and wrote thereon, "defendant does not object to the entry and allowance of the above motion, but move to dismiss said cause for failure to comply with the rule or leave to amend [illegible]" and that he thereafter gave notice that he would call the motion up for disposition December 8, 1919, at the opening of court; that counsel for defendants wrote plaintiff's attorney on December 13, 1919, notifying them of the rule to file a declaration within five days; that

The motion of the defendant for a rule on plaintiffs to file an amended declaration waived the motion to dismiss and, in effect, reinstated the case upon the filing by plaintiffs of a declaration in response to the rule. Munster v. Doyle, 50 Ill. App. 672; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61. This being the state of the record, we do not think we can pass on the matters argued by appellee, that the demurrer should be carried back to the declaration and judgment given for the defendant on the ground that plaintiffs can not recover under their declaration. The demurrer of defendant to plaintiffs' amended declaration has not been disposed of by the trial court. Action thereon by that court must precede a ruling on the same question by this court. The judgment is therefore reversed and the cause is remanded.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

98 - 26754

FRED A. BROWN,
Plaintiff in Error,

vs.

FREDERICK S. OLIVER and HARRY H. HARPER, Copartners Trading as OLIVER & COMPANY,
Defendants in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

228 I.A. 6364

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant, who was plaintiff below, brought an action for fraud and deceit against the appellees, copartners, charging that they had secured the execution of a written contract with him through fraudulent representations. A demurrer was sustained to the original declaration, whereupon plaintiff filed an amended declaration in two counts. A general demurrer to this declaration was also sustained. The plaintiff elected to stand by his amended declaration and judgment for costs was entered against him. He sued out this writ of error to secure a review of the record. The sole question to be decided is whether the amended declaration states a cause of action.

The declaration charges that the defendants were interested in the sale of certain lands known as the Snipe Lake Wheat Lands, in Saskatchewan, Canada, and being desirous of raising money in an advertising campaign for the sale and disposition of said lands, on February 14, 1918, induced plaintiff to enter into a contract by false and fraudulent promises, "and wrongfully and injuriously contriving and intending to deceive, defraud and injure the plaintiff, falsely, fraudulently and deceitfully represented to the plaintiff that they would repay the sum of ten thousand dollars out of their commissions from the sale of said land, at the rate of two dollars ($2.00) for every acre of land

PAUL A. BROWN,
Plaintiff in error,

vs.

ZACHARIAH G. OLIVER and EARNY H. HARPER, Copartners Trading as OLIVER & COMPANY,
Defendants in error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE KENESAW DECLARED THE OPINION OF THE COURT.

Appellant, who was plaintiff below, brought an action for fraud and deceit against the appellees, copartners, charging that they had secured the execution of a written contract with his through fraudulent representations. A demurrer was sustained to the original declaration, whereupon plaintiff filed an amended declaration in two counts. A general demurrer to this declaration was also sustained. The plaintiff elected to stand by his amended declaration and judgment for costs was entered against him. He sued out this writ of error to review a ruling of the record. The main question to be decided is whether the amended declaration states a cause of action.

The declaration alleges that the defendants were interested in the sale of certain lands known as the Snipe Lake Wheat Lands, in Saskatchewan, Canada, and were dealing of principally in such lands, on February 14, 1910, I agreed [illegible] to enter into a contract by letter and for valuable considerations. That accordingly and in pursuance of said letter, [illegible] to enter into a contract by letter and for valuable considerations. That accordingly copartnership and not wishing to deceive, defraud and injure the plaintiff, falsely, [illegible] deceitfully represented to the plaintiff that they [illegible] the use of ten thousand dollars out of their money [illegible] sale of said land, at the rate of two dollars (2.) or more acre of land

sold by them; that the said plaintiff should have an interest in the operation by J. E. Hauskins & Co. of the lands sold by the said defendants, and the said defendants agreed that the said plaintiff should share in said interest in a sum equivalent to two per cent in the cultivation of all lands in said Snipe Lake District sold by said defendants, as fully set forth in the contract; that if a corporation should be hereafter formed to take over the said business, as specified in said contract, that two per cent of the capital stock shall be allotted to the said plaintiff, and without any further consideration than the furnishing of the said sum of ten thousand dollars, as provided for under the terms of said contract; that the land grew wheat that was selling at two dollars per bushel; that the land was then worth the market value of $65 per acre; that the plaintiff would grow immensely rich by this investment, and would triple his investment; that the defendants undertook to sell said Snipe Lake Wheat Lands within 30 days from the date of said contract, and that thereby the plaintiff would have his investment returned to him within 60 days; that plaintiff would never have an investment offered him that was so well safeguarded; that his investment was the first development enterprise in which the plaintiff was protected from unforeseen development expenditures; that the defendants stated that they had expended to date $25,000 on said lands, and agreed to invest the further sum of $100,000 of their own money in an advertising campaign, exclusive of moneys invested by plaintiff under his contract.

That plaintiff, not having seen the land and relying and confiding in the representations, entered into a contract, which is set up in haec verba. This contract in substance pro-

sold by them; that the said plaintiff should have an interest in the operation by J. B. Hemsing & Co. of the lands sold by the said defendants, and the said defendants agreed that the said plaintiff should share in said interest in a sum equivalent to two per cent in the cultivation of all lands in said Lake District under the said contract; that the said plaintiff was induced to enter into said contract by reason of the representations of the said defendants, as fully set forth in the contract; that if a corporation who.id be necessary formed to take over the said business, as specified in said contract, that two per cent of the capital stock shall be allotted to the said plaintiff, and without any further consideration than the furnishing of the said sum of ten thousand dollars, as provided for under the terms of said contract; that the land upon which they were then worth the market value of $25 per acre; that the plaintiff would upon immediately rom by this investment, and would satisfy his investment; that the defendants undertook to sell said Lake Water within 24 days from the date of said contract, and that thereby the plaintiff would have his investment returned to him with 2% days; that plaintiff would never have an investment offered him that was so well secured; that his investment was the first dominion authorized; that the defendants or the said they had expended to date $25,000 on said lands, and agreed to invest all further sum of $150,000 of their own money in the Waterlily Lake District, exclusive of monays invested by plaintiff under the contract.

That plaintiff, as above mentioned under the said contract, and conforming in the manner therein entered into contract.

which is set up in said writing. Said contract in writing here-

vides that plaintiff agrees to contribute to defendants the sum of $10,000 for the purpose of defraying the initial expenses of advertising and promoting the sale of said lands, which defendants had undertaken as the general agents of J. E. Houskins & Co.; that the money so advanced should be repaid out of commissions earned by defendants at the rate of $2.00 for every acre of land sold by the parties of the second part, upon the payment of the purchase price of $65 per acre by the purchaser; that plaintiff should have an interest equivalent to 2 per cent. in the cultivation of all land in the Snipe Lake District sold by defendants as general sales agent in behalf of J. E. Houskins & Co., and the equipment therefor, and that if a corporation should be formed to take over the business plaintiff should have allotted to him 2 per cent. of the capital stock. The consent of J. E. Houskins to these promises is written on the contract.

The amended declaration also alleged that plaintiff paid the sum of $10,000, and that not less than sixty days after the date of the contract defendants abandoned the enterprise; that the representations were made by defendants while knowing the same could not be fulfilled. In a second count the declaration alleged in addition to the above that "the said defendants at the time of entering into the agreement of the 14th day of February, 1918, and for a long time prior thereto, acting as the agents of the said plaintiff, for and in that behalf in a fiduciary capacity, promised and agreed with the plaintiff that they, the defendants, would, as plaintiff's agent, and while acting as the agents for and in this behalf of the plaintiff, secure the return of his investment within sixty days of the date of the contract."

We think the declaration failed to state a cause of action in fraud and deceit. Fraud is a false representation of a

material fact made with the intention to deceive, with knowledge of its falsity or with reckless disregard of whether it be true or false, upon which the plaintiff relies to his injury. The representations set forth in the amended declaration were either of future occurrences which, though false, are not actionable as frauds; Keithley v. Mutual Life Insurance Co., 271 Ill. 584; mere expressions and opinions also not actionable; Bouxsein v. Granville Nat. Bank, 292 Ill. 500; and of matters equally within the knowledge of both parties, or immaterial; in neither of which cases are the same actionable. Tuck v. Downing, 76 Ill. 71.

Appellant relies much on the theory that the second count alleges a fiduciary relationship between the parties. This, however, is averred only as the conclusion of the pleader, which is insufficient. Phillips v. Gannon, 246 Ill. 98. But even if the relationship were sufficiently averred, plaintiff's contention in this respect could not be sustained for the reason that it affirmatively appears from the pleading that this relationship, if it existed, was not an essential element but only a collateral circumstance of the transaction. The remedy for the injury set forth in the declaration is not in this form of action.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

material fact made with the intention to deceive, with knowledge of its falsity or with reckless disregard of whether it be true or false, upon which the plaintiff relies to his injury. The representations set forth in the amended declaration were either of future occurrences which, though false, are not actionable as fraudulent; Keighley v. Mutual Life Insurance Co., 271 Ill. 564; mere expressions and opinions also not actionable: Bourmein v. Grenville Mut. Bank, 292 Ill. 590; and of matters equally within the knowledge of both parties, or immaterial; in neither of which cases are the same actionable. Tuck v. Downing, 76 Ill. 71.

Appellant relies much on the theory that the second count alleges a fiduciary relationship between the parties. This, however, is waived only as the consummation of the pleader, which is insufficient. Whiting v. Brunon, 260 Ill. 78. But even if the relationship were sufficiently averred, plaintiff's conversation in this respect could not be construed for the reason that it affirmatively appears from the pleading that this relationship, if it existed, was not an essential element but only a collateral circumstance of the transaction. The remedy for the injury set forth in the quasi motion is not in this form of action.

The judgment is affirmed.

Dever, P. J., and McSurely, J., concur.

109 - 26765

THE KEMLER LUMBER CO.,
a Corporation,
Appellee,

vs.

UP-TO-DATE MACHINE WORKS,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case plaintiff appellee's statement of claim alleged the sale and delivery by plaintiff to defendant of 18,480 feet of 2 X 6 factory maple flooring at $70 a thousand feet, with war tax of $3.22 added, and that no part of the purchase price had been paid.

The defendant sets up in its affidavit of merits an alleged defense to the whole of plaintiff's demand, which defense is stated to be that "plaintiff did not deliver to defendant 18,400 feet of 2 X 6 flooring or any other kind of lumber or merchandise." The affidavit further states that an agent of plaintiff brought to defendant's place of business a truckload of lumber, of an unknown amount, and that on examination it was found defective in that it was decayed, warped and unsalable for the purpose for which it was ordered, to-wit, "to use as flooring in the buildings of defendant," and that the agent of plaintiff "asked permission to leave the same upon defendant's premises until a convenient time to remove the same, which request was granted," and that "the lumber is now on the premises of defendant, subject to the order of plaintiff, and has not been accepted and will not be accepted by the defendant."

The cause was tried by the court without a jury and

109 - 26765

THE KREIER LUMBER CO.,
a Corporation,
Appellee,

vs.

UP-TO-DATE MACHINE WORKS,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

229 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case plaintiff appellee's statement of claim alleged the sale and delivery by plaintiff to defendant of 16,480 feet of 2 X 6 factory maple flooring at $70 a thousand feet, with war tax of $3.32 added, and that no part of the purchase price had been paid.

The defendant sets up in its affidavit of merits an alleged defense to the whole of plaintiff's demand, which defense is stated to be that "plaintiff did not deliver to defendant 16,480 feet of 2 X 6 flooring or any other kind of lumber or merchandise." The affidavit further states that an agent of plaintiff brought to defendant's place of business a truckload of lumber, of an unknown amount, and that on examination it was found defective in that it was decayed, warped and unfit for the purpose for which it was ordered, to-wit: "for use as flooring in the buildings of defendant," and that the agent of plaintiff asked permission to leave the same upon defendant's premises until a convenient time to remove the same, which request was granted;" and that "the lumber is now on the premises of defendant, subject to the order of plaintiff, and has not been accepted and will not be accepted by the defendant."

The cause was tried by the court without a jury and

finding was for the plaintiff in the sum of $1296.82, and judgment entered on the finding.

The evidence for plaintiff tended to show that the business in controversy was conducted on behalf of defendant through its secretary, Maurey; that April 2nd he executed the following order in writing:

"Please enter our order for the following: 18,000 feet 2/6 Maple Factory Flooring $70. per 1000, delivery when asked."

that at the time of executing the order Mr. Maurey said they would want the lumber in about sixty days; that plaintiff thereupon ordered the car of lumber; that the lumber arrived on the C. B. & Q. side track at 18th and Canal streets; that Maurey asked that the car be put in the yard until he wanted it; that he was told it must be unloaded; that he, Maurey, said he could not handle it, and he was told the car would be unloaded at 18th and Canal and that he could have about a month in which to take it; that about a month later Maurey informed plaintiff that he could not take it; that they had changed their plans and were not going to use it for a while, and asked if plaintiff could dispose of it; that he was told "No," when he said that defendant would try to make place for it on a vacant lot, and later said that plaintiff could send it in a couple of days; that after three or four loads were delivered Maurey stopped delivery on account, as he said, of lack of space; that he again was seen and told he could put more on top of the pile, when he said to send out the balance, which was accordingly done.

On the other hand the evidence for the defendant was to the effect that after a few loads of the lumber were delivered Maurey told the driver, "I don't want none of that lumber, it is no good, I told him I cannot use that lumber because it is not the lumber I ordered. I said, 'If you unload that lumber that is

finding was for the plaintiff in the sum of $1200.80, and judg-
ment entered on the finding.

The evidence for plaintiff tended to show that the business in controversy was conducted on behalf of defendant through its secretary, Searcy; that April 2nd he executed the following order in writing:

"Please enter our order for the following: 18,000 feet 2/8 Maple Factory Flooring @30. per 1000, delivery when marked," that at the time of execution the order Mr. Searcy said they would want the lumber in about sixty days; that plaintiff thereupon ordered two car of lumber; that the lumber arrived on the C. R. & I. ride track at 18th and Canal streets; that Searcy asked that the car be put in the yard until he wanted it; that he was told it must be unloaded; that he, Searcy, said he could not handle it, and we was told the car would be unloaded at 10th and Canal and that he could have about a month in which to take it; that about a month later Searcy informed plaintiff that he could not make it; that they had planned it in here and were not going to use it for a while, and that plaintiff could dispose of it; that he was told "No," when he said that defendant would try to make place for it on a vacant lot, and later said that plaintiff could send it in a couple of days; that after three or four loads were delivered Searcy stopped de ivery on account, as he said, of lack of space; that the width was been not lot he could put more on top of the pile, when he said to send out the balance, which was accordingly done.

On the other hand the proof for the defendant was to the effect that after a few loads of the lumber were delivered Searcy told the driver "I don't want none of that lumber, it is no good, I told him I cannot use that lumber because it is not the lumber I ordered. I said, 'If you unload that lumber that is

at your risk. I won't give you the help to unload it, because it is bad lumber, split and rotten all over.'" Maurey further testifies that he called Mr. Kemler of the plaintiff company and told him the same thing; that he, Kemler, said "'Take it in, the driver is on the way, I cannot stop him now.' I says, 'It will be at your own risk if you do,' so he says to take it and he will come and see me." The witness further says that he had a talk to the same effect with Mr. Carmichael of the plaintiff company, and that at the time the order was given it was orally agreed that defendant should have lumber of the same kind as that furnished on a prior order; that this lumber was not of the same kind.

Much evidence was heard by the court on behalf of the plaintiff to the effect that the lumber was of the kind described in the written order, and on behalf of defendant to the effect that it was very defective and not of the kind previously furnished.

We think the controlling question under the pleadings is whether the lumber delivered was in fact accepted. As bearing on this issue, a letter written by defendant in response to the letter of the attorney for plaintiff, stating that the account had been placed in his hands for immediate adjustment, is significant. The reply states:

> "Replying to yours of October 1st in reference to the claim of the Kemler Lumber Co., more than forty per cent of this lumber is below specification and cannot be used. We are willing to settle our bill just as soon as Kemler Lumber Co. make proper allowance for the poor lumber. We have no desire whatsoever to enter into a lawsuit in regard to this matter, and wish to settle same to the satisfaction of all concerned."

The evidence also tends to show that one of defendant's men piled up the lumber; that after it was unloaded defendant had its men separate what was considered the best lumber from the

at your risk. I won't give you the help to unload it, because it
is bad lumber, split and rotten all over.'" Mawsey further tes-
tified that he asked Mr. Keeler of the plaintiff company and told
him the same thing; that he, Keeler, said "Take it in, the driver
is on the way, I cannot stop him now." I says, "It will be at
your own risk if you do," he says to take it and he will come
and see me." The witness further says that he had a talk to the
same effect with Mr. Carmichael of the plaintiff company, and that
at the time the order was given it was orally agreed that defendant
should have lumber of the same kind as that furnished on a prior
order; that this lumber was not of the same kind.

Much evidence was heard by the court on behalf of the plaintiff to the effect that the lumber was of the kind described in the written order, and on behalf of defendant to the effect that it was very defective and not of the kind previously furnished.

We think the control the question under the pleadings is whether the lumber delivered was in fact accepted. The contract on this issue, a letter written by defendant in response to the letter of the attorney for plaintiff, stating that the account had been placed in his hands for collection, is explicit. The reply states:

> "Replying to yours of October 1st in reference to the claim of the Parker Lumber Co., here these forty per cent of this lumber is below specification and cannot be used. We are willing to settle for what was sent on a Parker Lumber Co. memorandum to the yard foreman. We have no driving objection to the proper allowance for the poor lumber. We are willing even to ship the lumber back and credit us with the amount, but we cannot be responsible for the cost of the lumber in the meantime."

rest and put it in separate piles. It also appears from the additional abstract of the record that when one of the experts who testified examined the lumber while the trial was in progress, he found several pieces of board that showed new saw cut marks thereon. Section 48 of the Uniform Sales Act, Hurd's Rev. Stat. 1919, chapter 121a, page 2665, provides:

> "The buyer is deemed to have accepted goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

We think the uncontradicted evidence in this case shows acts of defendant in relation to this lumber which is inconsistent with the ownership of the seller, and amount in law to an acceptance of the goods. It is true that under the provisions of the Sales Act, in the absence of express or implied agreement of the parties, acceptance of the goods would not discharge the seller from liability for damages for breach of any promise or warranty in the contract to sell; but the defendant did not set up any counter claim in his affidavit of merits, nor file any offset, based on the breach of any promise or warranty. But even if the issue had been raised by the pleadings, the evidence is so conflicting that we would not be able to say that the finding of the trial Judge should be set aside. It appears from the record that samples of the lumber were brought into court, and submitted to the examination of the trial Judge. These exhibits have not been preserved for our inspection. The trial court therefore had unusual advantages for weighing the evidence. We cannot on this issue of fact, therefore, say that the judgment is manifestly against the weight of the evidence.

The judgment is affirmed. AFFIRMED.

Dever, P. J., and McSurely, J., concur.

Dever, P. J., and McCurdy, J., concur.

The judgment is affirmed.

WILSON,

against the weight of the evidence.

issue of fact, therefore, may the judgment be modified

usual advantages for weighing the evidence. We cannot on this

preserved for our investigation. The trial court therefore had un-

the examination of the trial judge. These subtleties have not been

trial judge should be correct. It was upon the record that

flicting that we would not be apt to say that the finding of the

the issue had been raised by the pleadings, the evidence is so con-

sat, based on the breach of any promise or warranty. But even if

up any counter claim in his efficient of merits, nor file any affi-

warranty in the contract to sell; but the defendant did not set

sailor from liability for damage for breach of any promise or

of the written, acceptance of the goods would not discharge the

of the Sales Act, in the absence of express or implied agreement

an acceptance of the goods. It is true that under the negations

sonsistent with the ownership of the seller, it cannot be law to

shows acts of defendant in relation to this lumber which is in-

I think the uncontradicted evidence in this case

> "The buyer is deemed to have accepted goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and is doing any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Stat. 1919, chapter 111a, page 2066, provides:

> "The buyer is deemed to have accepted goods when after the expiration of a reasonable time he retains the goods without rejecting them."

Section 48 of the Uniform Sales Act, Wyo's Rev.

therein. ~~The judgment is affirmed.~~

found several pieces of wood that appeared new but out maybe

testified examined the lumber while the trial was in progress,

additional abstract of the record that when one of the deputies who

rest and put it in separate piles. It also appears from the ad-

116 - 26773

HARRY G. SMITH,
Appellee,

vs.

SAMUEL GOLDMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

222 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in this case sued the defendant in an action on the case for damages alleged to have been sustained by reason of the neglect of the defendant in driving his automobile at the intersection of LaSalle and Monroe streets in the city of Chicago on June 22, 1918. Judgment in the sum of $5,000 was entered on the verdict of a jury in favor of plaintiff, and this appeal followed.

Appellant does not claim that plaintiff was guilty of contributory negligence. His principal contentions are that a clear preponderance of the evidence tends to show that defendant was not guilty of any neglect proximately tending to cause the injuries for which plaintiff sued, and that the judgment is for an excessive amount. It is, of course, the duty of this court to examine the evidence and if the verdict is clearly and manifestly against the weight of it, to set it aside.

The accident in question occurred about 11:20 a. m. LaSalle street extends north and south. Monroe street east and west. The intersection of these streets is in the heart of the business district of Chicago, and the condition of traffic at the time of day the accident happened made the situation a dangerous one. For that reason a traffic officer was stationed there to control the traffic.

Plaintiff was at that time living in Sterling, Illinois,

MARK O. MILLER,
Appellee.

vs.

SAMUEL DOUGLAS,
Appellant.

On Writ of Error.

Mr. JUSTICE MACRUDER DELIVERED THE OPINION OF THE COURT.

The plaintiff in this case sued the defendant in an
action on the case for damages alleged to have been sustained by
reason of the neglect of the defendant's wife in driving his automobile
at the intersection of Walnut and Center streets in the city
of Chicago on June 25, 1913. Judgment in the sum of $8,000 was
entered on the verdict of a jury in favor of plaintiff, and this
appeal followed.

Defendant does not claim that plaintiff was guilty of
contributory negligence, but insists that defendant's wife was not
guilty of any negligence proximately causing or contributing to cause the
injuries for which plaintiff sued, and that the judgment is for
an excessive amount. It is, of course, the duty of this court to
examine the evidence and if the verdict is not sustained thereby
against the suit of it, to set it aside.

The accident in question occurred about 11 P.M. on
Dearborn street, extending north and south, across which runs
Walnut street, extending east and west. The intersection of the
two streets is controlled by a traffic officer. At the time of the
accident the weather was clear and the pavements were dry. The
evidence for plaintiff tends to show that he was driving his
automobile in a southerly direction on Dearborn street, and as he
approached Walnut street he brought his car to a stop behind a
line of automobiles which were standing in front of the traffic
officer. After remaining there a few minutes, the traffic officer
motioned to the automobiles to proceed, and plaintiff started his
car forward, and when he had proceeded about 15 feet, he was
struck by defendant's automobile, which was driven by defendant's
wife, and which was proceeding in a westerly direction on Walnut
street. The testimony of plaintiff and his witnesses tends to show
that the automobile driven by defendant's wife was proceeding at a
high rate of speed, and that it struck plaintiff's automobile
with great force, causing it to turn around and overturn, and
throwing plaintiff out and injuring him. Defendant's wife
testified that she was driving her automobile at a rate of
about 15 miles an hour, and that she did not see plaintiff's
automobile until it was about 15 feet away, when she turned to
the left in order to avoid striking it, but was unable to
prevent the collision.

Plaintiff was at that time [illegible], Illinois,

but had been a visitor to the city before and was somewhat familiar with the condition of travel in the heart of the city. He was walking north on the east side of LaSalle street and when he reached Monroe street waited for the traffic to go his way. When the whistle blew plaintiff walked along with other pedestrians until, as he says, "The first thing I knew I was sitting down on something and then up in the air, and jammed up against another car." The injury to plaintiff was caused by the collision of a mail truck driven by a Government employee with a five passenger touring automobile driven by the defendant. The mail truck was moving north on the east side of LaSalle street; the touring car was moving in a southerly direction on the west side of the same street. The defendant says when he first observed the mail truck it was 150 feet south of Monroe street and was proceeding north on a wet pavement, at a speed of not less than 15 to 20 miles an hour; that when he started south he put his hand out, giving the proper signal to indicate that he was to turn the corner; that the streets were slippery and that he proceeded very slowly; that when he got within three feet of the southeast corner, the automobile was struck right in the center by the mail truck; that he was going round the corner at a speed of not more than six or eight miles an hour; that when his car was struck it slid over to the northeast corner of Monroe and LaSalle streets. He says, "I was struck with such force that I could not control my car in any direction; I slid right over. I remember picking up Smith and carrying him over. I hit another car and pinned Smith between my car and the other."

The driver of the truck testifies that he was proceeding at a speed of about eight miles an hour, when all of a sudden this touring car swung over in front of him, right by his side. He says, "I tried to avoid; I seen that there was no way

of getting away from him, that I would have to hit him." He says defendant was swinging around the corner at a speed of eighteen miles per hour, and that he, defendant, did not make his signal, indicating that he was going to turn, did not put out his hand or blow a horn.

The traffic officer testifies that from the time defendant's automobile undertook to turn from LaSalle street to Monroe street it had time to get on to Monroe street away from the ongoing truck, except for the speed of the truck, and that defendant kept going at the same rate of speed until he was struck by the truck; that he, defendant, passed him, the officer, on the west side. Ten witnesses in all testified to the occurrence, and it is the contention of the defendant that the overwhelming weight of the evidence is to the effect that the negligence of the truck driver was the sole cause of the plaintiff's injury.

It may be conceded that a preponderance of the evidence indicates that the driver of the truck was negligent, but this alone is not sufficient necessarily to indicate that defendant was in no respect guilty of concurring negligence. We think that not alone the testimony of the witnesses, but the facts and circumstances, indicate that the question of whether he was guilty of such concurring negligence, was for the jury. The evidence is undisputed that defendant saw the driver of the truck and noted the speed at which he was proceeding when the truck was 150 feet away. The north and south traffic was then moving in response to the whistle of the traffic officer. If defendant had waited until this traffic had passed, it may be that the collision would not have occurred.

mere accurred.

thin traffic had ended, it w[illegible] the white [illegible]
the approach at which the accident occurred. The north and south traffic was [illegible] away. The north and south traffic was [illegible] the speed at which he was travelling when [illegible] 150 feet [illegible] maintained that there was the driver of [illegible] and noted of such circumstantial evidence, was for the [illegible]. He was unable to [illegible] circumstances indicate [illegible] question [illegible] may be guilty [illegible] statement[illegible]. Indeed [illegible] the [illegible] and that not alone the [illegible] of the [illegible], but this alone is not sufficient [illegible] to indicate that defendant was in no respect guilty of [illegible]. To think dence indicates that the driver of the truck was negligent, but driver was the sole cause of the plaintiff's injury.

It may be conceded that a preponderance of the evidence is to the effect that the weight of the evidence is to the effect that the overwhelming weight on the west side. The [illegible] is [illegible] to the occurrence, struck by the truck; that [illegible], [illegible], the officer, defendant kept going at the same rate of speed until he was the oncoming truck, except for the speed of the truck, and that Monroe stated it had time to get out to center street many from [illegible] automobile undertook to turn from Imperial street to [illegible] traffic indicates that from the time defendant was driving around the corner at a speed of eighteen miles per hour, and that he, defendant, did not make his signal, or getting away from him, that I would have to hit him." He made

flow a horn.

The plaintiff's testimony indicates that from the time de-

turning [illegible] that he was going to turn, and not put out his head or

We think the jury was justified in finding that defendant decided to take the chances of beating the truck, and for that purpose made the turn at a speed which the defendant concedes may have been ten miles an hour. It was a crowded street, as the noon hour approached. Defendant and others then driving at that place were bound to exercise reasonable care, in view of the apparent situation. In view of defendant's own testimony that he saw the truck coming, it was a question for the jury to say whether a person in the exercise of reasonable care would have tried to make the turn ahead of the truck. As to the manner in which it turned, the speed, whether he signaled the truck, whether he kept his car in control, the evidence is conflicting. We have read the testimony and without discussing it in detail we are inclined to the view that the verdict of the jury was justified.

Appellant further contends that even if defendant was negligent, his negligence was not the proximate cause of plaintiff's injury, and on this point relies on Beithe v. Commonwealth Elect. Co., 241 Ill. 252. He argues that he, defendant, could not reasonably be supposed to anticipate that the turning of the corner in the manner indicated would result in injury to the plaintiff. We do not think the authority cited applicable to the facts appearing here. The street was, as before stated, crowded, the situation dangerous, and an ordinarily prudent person would, we think, have foreseen, not the precise accident of course, but that some such accident might probably occur, as a result of defendant's negligence.

Appellant next contends that the damages are excessive. In this respect the evidence for the plaintiff is not contradicted. Plaintiff at the time of the injury was 48 years of age; he had been crippled in his right leg from boyhood by hip

disease and walked with a cane. He wore an extension shoe eight or nine inches high. After the injury he was taken to St. Luke's hospital; his left leg was lacerated from knee to the groin. He was operated on and was in the hospital about seven weeks. After the first dressing he was taken care of by interns. Flesh was taken from his leg at different times. After leaving the hospital he went to his mother's home at Polo, Illinois. He used a crutch and cane, and six weeks after leaving the hospital resumed work as bookkeeper at a salary of $25 a week. His leg gave him pain, and at the time of the trial would become numb. He paid $50 to the doctor and $15 a week for the care at the hospital. After leaving Chicago he was treated by another doctor at Sterling, Illinois, who dressed the injured limb about three times a week until the end of the year. Dr. Harsha, the first attending physician, testified: "I examined him and found he had lacerated wounds of the left lower thigh; the skin was torn and the muscles were torn on the thigh; the wound required suturing the muscles of the thigh and skin, through the muscles of the lower part of the left thigh. That was on the inside of the left leg. We cleaned the dirt out of it. I sewed the muscles and skin up and drained it. The laceration must have been six or seven inches long and around two inches deep. * * * The popliteus and pyriformis was torn across; that is, the rectus femoris and the biceps femoris were torn across, and part of the sartorius muscle was torn right across; that is, torn into the substance of the muscle. The function of these muscles is to extend the knee at the thigh. They rotate the knee up, like this, at the thigh; extend the leg, not the knee, that is from the leg up. * * * I know about what his condition is. There is a big scar from loss of substance across where the wound was. The leg shows a

little functional loss from the wound. It would be very hard for me to estimate on the percentage of functional loss in the leg."

It is shown by the evidence that there was a big scar from the loss of substance across where the wound was, and that the court, on objection made, refused to allow the jury to see the injured limb. We think, in view of this evidence, we cannot say that the verdict of $5,000 is so excessive as to indicate passion or prejudice.

Some instructions asked for by defendant were refused which might well have been given; but on the whole the jury was fully and correctly instructed and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

little functional loss from the wound. It would be very hard for me to estimate on the percentage of functional loss in the leg."

It is shown by the evidence that there was a big sore from the loss of substance across where the wound was, and that the court, on objection made, refused to allow the jury to see the injured limb. We think, in view of this evidence, we cannot say that the verdict of $6,000 is so excessive as to indicate passion or prejudice.

Some instructions asked for by defendant were refused which might well have been given; but on the whole the jury was fully and correctly instructed and the judge's charge was timed.

Affirmed.

Dover, P. J., and McCrory, J., concur.

128 - 26785

ANNIE HANSEN,
Appellant,

vs.

CITY OF CHICAGO,
Appellee.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

222 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued the defendant, City of Chicago, in her declaration alleging that the defendant in question, neglecting its duty, carelessly and negligently suffered a certain sidewalk controlled by it to be "out of repair and in a broken and sunken condition" for a long time, all of which it knew or with the exercise of diligence might have known; that she, plaintiff, was with due care walking thereon when she stepped upon a defective part thereof, and was thereby thrown down and injured; that the sidewalk at the point complained of had sunken in the defective and unrepaired portion thereof to a depth of, to-wit, twelve inches below the level of said sidewalk, and that a pool of water had been allowed by defendant to form therein; that at the time of her injury ice had formed thereon and snow had accumulated thereon.

Defendant pleaded the general issue and plaintiff offered evidence tending to sustain the material allegations of her declaration. At the close of plaintiff's evidence the court on motion of defendant instructed the jury to return a verdict of not guilty. Plaintiff's motion for a new trial was overruled and judgment entered against her for costs.

It is apparent that the court had in mind the general rule that a municipality is not, under the law of this State, liable

128 - 26785

ANNIE HANSEN,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

COOK COUNTY.

APPEAL FROM CIRCUIT COURT OF

MR. JUSTICE KIMBROUGH DELIVERED THE OPINION OF THE COURT.

Plaintiff sued the defendant, City of Chicago, in her declaration, alleging that the defendant in question, negligently and carelessly and negligently suffered a certain sidewalk controlled by it to be "out of repair and in a broken and sunken condition" for a long time, at which it knew or with the exercise of ordinary care should have known; that by, plaintiff, was with due care walking thereon when she stepped upon a defective part thereof, and was thereby thrown down and injured; that the sidewalk at the point complained of had broken in the defective part thereof, and was "out of repair, worn, broken and sunken to the level of a sidewalk, and left a hole of twelve inches wide by twelve inches deep" and was dangerous and unsafe for pedestrians thereon.

Defendant denied the material issues and by [illegible] alleged contributory negligence on the part of plaintiff, in that she failed to exercise ordinary care for her own safety. At the close of plaintiff's evidence the court on motion of defendant instructed the jury to return a verdict of not guilty. Plaintiff's motion for a new trial was overruled and judgment entered accordingly. Plaintiff appeals.

It is contended that the court erred in directing a verdict for defendant, for the reason that the evidence tended to show that a municipality, under the law, is liable

for what are called "slipping accidents," that is, injuries resulting from the temporary slipperiness of sidewalk or street resulting from natural causes; but that rule does not obtain as we understand it where, as here, the evidence tends to show that the slippery condition of the sidewalk concurs with a defect therein, without which defect the jury might reasonably find the injury would not have occurred. City of Chicago v. Chace, 33 Ill. App., 551; Richmond v. Marseilles, 190 Ill. App. 227; Dracass v. City of Chicago, 193 Ill. App. 75, 3 A. R. L. 1130.

Defendant has not appeared in behalf of the judgment entered in its favor. The judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Hever, P. J., and McSurely, J., concur.

for what are called "slipping accidents," that is, injuries resulting from the temporary slipperiness of sidewalk or street resulting from natural causes; but that rule does not obtain as to injuries from permanent defects in the sidewalk which are known to the city or which could have been discovered by the exercise of reasonable care. City of Chicago v. Chase, 33 Ill. App., 321; Richmond v. Merrellan, 190 Ill. App. 227; Duncan v. City of Chicago, 192 Ill. App. 78, 7 A. L. R. 1120.

Defendant has not disproved in behalf of the judgment entered in its favor. The judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Mayer, P. J., and McSurely, J., concur.

149 - 26808

OLGA WILLIAMSON,
Appellee,
vs.
FRANK KAPLAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

221 I. A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below sued the defendant alleging in her declaration that on September 3, 1914, she was walking on a sidewalk on Randolph street at the intersection of Green street and in the exercise of reasonable care, when defendant, by his servant, negligently managed and drove a horse and buggy along Green street, and that through his negligence the horse and buggy collided with plaintiff, injuring her. Defendant pleaded the general issue.

The case has been twice tried. On the first trial the jury disagreed, and on the last one the jury found the defendant guilty and assessed plaintiff's damages at the sum of $1,000, for which amount judgment was entered.

It is the principal contention of appellant that the verdict is against the manifest weight of the evidence, and that at any rate, under the rule announced in Peaslee v. Glass, 61 Ill., 94, the quantum of affirmative proof necessary to sustain the verdict was not produced, and that the judgment should therefore be reversed.

Plaintiff testified in substance that at the time in question she was walking eastward on the north side of Randolph street on the left side of the street; that when she got to Green street she stepped off the curb and looked both ways; that she saw no vehicles or buggies going from either direction, whereupon she

JAS - 26805

OLGA KIMMIMSON,

Appellee.

vs.

FRANK KAPLAN,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below sued the defendant alleging in her declaration that on September 3, 1914, she was walking on a sidewalk on Randolph street at the intersection of Green street and in the exercise of reasonable care, when defendant, by his servant, negligently managed and drove a horse and buggy along Green street, and that through his negligence the horse and buggy collided with plaintiff, injuring her. Defendant pleaded the general issue.

The case has been twice tried. On the last trial the jury disagreed, and on the last one the jury found the defendant guilty and assessed Plaintiff's damages at the sum of $1,000, for which amount judgment was entered.

It is the principal contention of defendant that the verdict is against the manifest weight of the evidence, and that at any rate, under the rule announced in Hanley v. Olsen, 91 Ill., 94, the question of affirmative proof necessary to sustain the verdict was not produced, and that the suit must fail. Therefore be reversed.

Plaintiff testified in substance that at the time in question she was walking eastward on the north side of Randolph street and stopped off the curb and looked out, saying that she was to cross the street on the left side; that when she got to Green street one horse looked out, saying that she was to cross the street on the left side; that when she got to Green

started to cross Green street; that she was accompanied by her sister-in-law (who was absent from the State at the time of the trial) and that when about two or three feet from the east curb her sister-in-law called to her; that she, plaintiff, looked over her left shoulder, when she was struck by the shafts of defendant's buggy, thrown to the street and became unconscious; that the first thing she remembered after that was that she was sitting on a box on the sidewalk at the east corner of the intersection, and that she does not remember how she got there.

The driver of defendant's buggy testified that he was driving the rig of defendant at the time in question; that he was going south on Green street and to the Maxwell street market; that the horse which he drove was sixteen or seventeen years old; that he drove on the west side of Green street, passed the corner of Green and Randolph streets at a speed of about three miles an hour; that a horse drawn truck was immediately ahead of him; that he did not see plaintiff prior to the time she was hurt nor afterwards until he saw her sitting on the box; that neither the horse nor wagon touched any person at that place on that day; that when he was in the center of Randolph street someone "hollered" and he went over to the northeast corner and stopped; that he then saw plaintiff sitting on a box in front of a commission house; but he denied the testimony of plaintiff to the effect that he, witness, had a black eye and referred to it at that time, saying, "Look what I got?"

Plaintiff's testimony as to the fact that she was hit by a buggy is corroborated by the testimony of one Connors, a detective for the City, and also by the ambulance physician at the Desplaines street station, who testified that he was called to the scene of the accident at the time in question; that he went there

scene of the accident at the time in question; that he went there
Dearborn street station, and testified that he was called to the
location for the City, and has no knowledge other than at the
by a public ambulance driven by a driver employed by the Company, a de-
fendant in this case, and that he was taken to the Cook County Hospital
I don't."

Plaintiff's testimony as to the fact that he was not
paid a dime was not referred to in the effort to, by witness'
be denied the testimony of plaintiff in the effort to, by witness'
plaintiff sitting on a box in front of a confectionery store; but
went over to the northeast corner and stood; that he then saw
he was in the center of Randolph six of a dozen "policemen and he
nor anyone touched any person at it I, Jim on that day; that when
he did not see plaintiff prior to the time he was hurt nor after-
wards until he saw him sitting on the box; that a little the horse
pony; that a horse drawn truck was standing [illegible] ahead of him; that
Green and Randolph streets at a speed of about three miles an
he drove on the west side of Green street, passed the corner of
the horse which he drove was driven on Jefferson Parks car; that
going south on Green street was to the Kinzie street market; that
driving the rig of defendant at the time in question; that he was
that she does not remember how she got there.

The driver of defendant's buggy testified that he was
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thing she remembered after that was that she was sitting on a
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her left shoulder, when she was struck by the shafts of defendant's
per sister-in-law called to her; that she, plaintiff, looked over
trial) and that when about two or three feet from the east curb
sister-in-law (who was absent from the Court at the time of the
started to cross Green street; that she was accompanied by her

and found two apparently injured women, one of whom was plaintiff; that they were taken to the emergency hospital, where a superficial examination was made; that they refused to remove their clothing for a more thorough examination; that he found an abrasion on plaintiff's left elbow; that he gave her spirits of ammonia and touched up the parts with tincture of iodine.

In response to the question, "Do you remember the policeman?" the driver answered, "I was standing on the corner for five minutes, and the policeman came over to me and asked if I drove that buggy, and I told him yes."

We do not think the doctrine announced in Peaslee v. Glass, supra, and followed in the cases cited by appellant is applicable to the state of facts which appears here. It is true that the driver and plaintiff contradict each other, but her narrative is more probable than his and better harmonizes with the undisputed facts of the case. These facts, we think, tend in the main to corroborate the plaintiff. We think the verdict of the jury was justified by the evidence and that it was properly instructed as to the law. The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

and found two apparently injured women, one of whom was plain-
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superficial examination was made; that they returned to remove
their clothing for a more thorough examination; that he found
an abrasion on plaintiff's left elbow; that he gave her spirits
of ammonia and touched up the parts with tincture of iodine.

In response to the question, "Do you remember the policeman?" the driver answered, "I was standing on the corner for five minutes, and the policeman came over to me and asked if I drove that buggy, and I told him yes."

We do not think the doctrine announced in Lawless v. Olson, supra, and followed in the cases cited by appellant is applicable to the state of facts which appears here. It is true that the driver and plaintiff contradict each other, but her narrative is more probable than his and better harmonizes with the undisputed facts of the case. These facts, we think, tend in the main to corroborate the plaintiff. We think the verdict of the jury was just fixed by the evidence and that it was properly instructed as to the law. The judgment is affirmed.

CONCURRED.

Dever, J., and Kennedy, J., concur.

158 - 26817

DR. J. FRANK ARMSTRONG,
Appellant,

vs.

ROBERT S. ABBOTT,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

223 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant brought a suit in case against the defendant appellee, alleging the publication of "false, scandalous, malicious, defamatory and libelous matter" of and concerning the plaintiff, to his damage. The matter in question was alleged to have been published in the "Chicago Defender," a paper of which the defendant is editor and proprietor. The article was headed "Dr. Armstrong slashed in a mixup." The article itself was as follows:

> "Dr. J. Frank Armstrong, 1924 West Lake Street, having his office and residence at 1924 West Lake Street, Chicago, is reported to have been seriously cut, Friday, November 9th, when he was accused of being familiar with a man's wife on Fulton street, Chicago. It is claimed that Dr. Armstrong was warned to discontinue his frequent calls at the residence, and Friday morning was found in the house when he was not answering a professional call. Presto change. Enter hubby. Exit Doc, without collar and pin, but a deep gash in his back. Park Avenue Hospital rendered medical assistance."

The declaration by innuendo charged that by the words used defendant meant to be understood as saying that plaintiff had been guilty of having improper sexual relations with the wife of another man residing on Fulton street, etc. A demurrer to plaintiff's third amended declaration was overruled, and defendant thereupon filed a plea of the general issue and gave notice of certain special matters upon which he would rely as matters of defense. To this notice plaintiff

MR. JUSTICE KAVANAGH DELIVERED THE OPINION OF THE COURT.

1SB - 3881Y

DR. J. FRANK ARMSTRONG,
Appellant,

vs.

ROBERT S. ABBOTT,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

The appellant brought a suit in case against the defendant appellee, alleging the publication of "false, scandalous, malicious, defamatory and libelous matter" of and concerning the plaintiff, to his damage. The matter in question was alleged to have been published in the "Chicago Defender," a paper of which the defendant is editor and proprietor. The article was headed "Dr. Armstrong Pleaded in a Delay." The article itself was as follows:

"Dr. J. Frank Armstrong, 1824 West Polk Street, having his office and residence at 1824 and 1826 West Polk street, Chicago, is reported to have been seriously ill, Friday, December 9th, when he was accused of being familiar with a girl who is Italian extract, Chicago. It is claimed that Dr. Armstrong was warned to discontinue his frequent calls at the residence, when Friday morning was found in the house when he was not acquainted or professional call. Upon the charge, Dr. Armstrong pleaded guilty. Fit e, fifty-dollar and cost. But a deep moan in his b ok, Dr. Frank Avenue "on 1121 received medical attention."

The declaration by an agent [illegible] to [illegible] would rely as matters of defense. [illegible] gave notice of certain [illegible] rule, and defendant thereon filed [illegible] demurrer to plaintiff's third amended declaration [illegible] with the rule of practice [illegible] plaintiff had been guilty of [illegible] improper [illegible]

filed a special replication, so called. No further efforts to settle the pleadings were made by either party, and in this condition the cause was submitted to a jury which, after hearing the evidence, brought in a verdict of not guilty, or which the court, after overruling motions for a new trial, and in arrest, entered judgment, and plaintiff appeals.

Rule 19 of this court requires that the brief of appellant or of plaintiff in error shall clearly and concisely state the error relied on for reversal. There are sixteen assignments of error attached to the record, and the brief of appellant does not tell us upon which of these appellant relies. The cause was not for oral argument, and from the statement made by counsel at that time we gather that the alleged error upon which he relies is that the court improperly received evidence offered by defendant over plaintiff's objection. The amended declaration was very broad by innuendo, and it is apparent the defendant did not, either by notice or plea, attempt to justify in the technical sense. Such a plea is in the nature of one in confession and avoidance, and there are decisions in this State which seem to hold that it ought to state the charge against the plaintiff with the same precision as an indictment. Cooper v. Lawrence, 204 Ill. App. 261; Dowie v. Priddle, 216 Ill. 555.

The notice, however, did set up matters of fact which, if true, tended to show that the words used did not imply the charge set up by the innuendo of the declaration; that the publication was not maliciously made; that the cause of action had been released, and certain other matters which might properly be considered by the jury in the mitigation of damages.

signed by the jury in the existence of deception.

reasoned, and certain other matters might be considered, question was not exclusively model; that the issue had been changed was by no the introduction of the declaration that the plaintiff if true, joined to show that the words used will not [illegible] the

Pridgin, 210 Ill. 206.

an instrument. Cooper v. Lawrence, [illegible] Ill; Ferris v. state the charge material for plaintiff with the case presented so are questions in this state which ought rarely to [illegible] it ought to place in the nature of an [illegible] evidence, and there notice or fact, sufficient to [illegible] the [illegible] whom a immune, and it in conferring the declaration will not, either by plaintiff's objection. The asserted [illegible] was very proper by the court improperly received evidence offered by defendant over the mere fact that the offered error does [illegible] in that for oral arguments, nor does the [illegible] apply to notice in that the error [illegible] on for reversal. There are minimum [illegible] of defiant or of plaintiff in error shall clearly and concisely state judgment, and plaintiff appeals.

June 19 of this court [illegible] that the panel of ob- after overruling motions for a new trial, and in arrest, entered ovidence, brought in a verdict of not guilty, as [illegible] the court, tion the cause was submitted to a jury which, after hearing the bottle the pleadings were made by either party, and in this capi- tiled a special replication, so ought. To further efforts to

The particular ruling complained of is that the court, over the objection of plaintiff, permitted one George O'Bannon to testify that he, the witness, at a date prior to the publication left a message for the plaintiff at plaintiff's office; that in response thereto the doctor called at the home of the witness; that when he came the witness, in the presence of the wife of the witness, accused him of improper conduct; that plaintiff grabbed the witness and the witness knocked plaintiff down; that in the fight which ensued plaintiff was cut and lost blood; that the wife of witness screamed and ran out of the door, and that the witness grabbed plaintiff by the collar and tore his necktie off; that plaintiff's automobile was then in front of the house, and that a number of persons were in the neighborhood at the time. The plaintiff moved to strike out this evidence on the ground that it was not admissible, because no plea of justification had been filed. We do not think the court erred in this respect.

Defendant relied on the special matters set up in his notice, which, under section 46 of the Practice act, Hurd's Rev. Stat. 1919, page 2263, he might properly do. Plaintiff did not seek to have the sufficiency of the notice tested prior to the hearing by demurrer or otherwise. On the contrary he unnecessarily filed a replication to it. The evidence was, we think, admissible under this notice, not for the purpose of justification; but on other issues which it was the duty of the jury to pass on. If the plaintiff feared that the jury might regard this evidence as tending to prove justification, he should have asked a proper instruction in that regard. The instructions are not abstracted, and for aught we know such an instruction may have been requested and given by the court.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

court.

The judgment is affirmed.

Dover, P. J., and Kennedy, J., concurred.

167 - 26826

BENJAMIN F. BUSH,
Appellee,

vs.

LOUIS S. COHN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

223 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This was an action in forcible detainer. There was a trial by jury, a verdict for the plaintiff and judgment entered thereon. The one issue of fact in the case was whether a certain clause in the lease which required either party to give a sixty day notice in order to terminate the tenancy was erased prior to the execution of the lease.

The witness Flagner testified that he was formerly a part owner of the premises and drafted the lease in question; that the lease at the time of the trial was in the same form as when it came back from the defendant; that he, the witness, struck out the sixty day clause when he wrote the lease. On cross-examination he said he did not submit the lease to defendant personally, but placed it in the mail box and that he found the lease returned to him in his mail box.

To the contrary defendant testified that the lease was not in the same condition as when he signed it; that the lease he signed did not contain any erasure; and that the sixty day clause in the lease was not erased at the time he signed it. He further denied that he had received a copy of the lease.

It is the contention of defendant that the evidence as to the erasure is evenly balanced, and the verdict should have been for the defendant under the rule stated in Beasley v. Glass,

[illegible] v. [illegible].

vs.

LOUIS S. COHN,

Appellant.

MR. JUSTICE MCCORMICK delivered the opinion of the court.

61 Ill. 95, followed in Haney v. Page, 213 Ill. App. 650, and many subsequent cases. We do not think that rule applicable to the facts in this case. Flagner, who testified for plaintiff, had sold his interest in the premises and was therefore a disinterested witness. The defendant, necessarily, was not.

Further, it appears that the original lease was in evidence and submitted to the jury, but it has not been preserved in the record for our inspection. Its physical condition may, for aught we can say, have had great weight with the jury, and properly so.

Appellant also contends that the court erred in instructing the jury. The record, however, does not show any objection made by him at the time, and we think there was no error which could have in any way confused the jury as to the issue.

Appellant further contends that there is no evidence that defendant is the owner of the premises. There is evidence of the relation of landlord and tenant between the parties, and under a familiar rule defendant is estopped. Carter v. Marshall, 72 Ill. 609; Knefel v. Daly, 91 Ill. App. 321.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

Dever, J. J., and Kearney, J., concur.

REVERSED.

The judgment is affirmed.

III, 609; Knebel v. Lutz, 81 Ill. Ab. 321.

a familiar rule defendant is entitled. Carter v. Turnbull, 72

the relation of landlord and tenant between the parties, and under

that defendant is the owner of the premises. There is evidence of

Appellant further contends that there is no evidence which could have in any way confined the jury as to the issue. location made by him at the time, and we think there was no error otherwise the jury. The record, however, does not show any op-

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Further, it appears that the original lease was in torneted witness. The defendant, necessarily, was not. had sold his interest in the premises and was therefore a disin-

the facts in this case. Wagner, who testified for plaintiff, many subsequent cases. We do not think that rule applicable to

97 Ill. 93, followed in Hanson v. Perry, 213 Ill. App. 830, and

176 - 26835

MARTIN LARSON,
Appellee,

vs.

JAMES D. HAND,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued on a promissory note for the sum of $3000.00, with interest at the rate of 6 per cent per annum, from June 5th, 1919. This note was made on said June 5th by the defendant to the order of one I. G. Wilson, and was by said Wilson duly endorsed prior to its delivery to the plaintiff.

The affidavit of merits admitted the execution of the instrument sued on, but denied that defendant had received any consideration for the note except the sum of $500. It further set up that about the 1st of February, 1919, I. G. Wilson was the agent of a certain mining company and also the agent of one Potter, who was the manager of that company; that Potter and Wilson entered into negotiations with the defendant for the purpose of selling to defendant and others associated with him a majority of the stock of said corporation; that the mining property in question had prior to the organization of the corporation been the property of persons known as "The Jenkins heirs;" that Potter entered into an agreement with the said heirs whereby he agreed to form a corporation to take over this mining property and to issue to the heirs $600,000 of the stock of the corporation in payment for properties, with the understanding that said heirs would put up this stock with Potter, who agreed to sell it and turn over the proceeds to the heirs; that the property was not to be deeded to this proposed corporation until the said stock had been sold and

MARTIN JACKSON,
Appellee,

vs.

JAMES D. HAMM,
Appellant.

MR. JUSTICE CRABBE DELIVERED THE OPINION OF THE COURT.

The plaintiff sued on a promissory note for the sum of $5000.00, with interest at the rate of 6 per cent per annum, from June 5th, 1919. This note was made on said June 5th by the defendant to the order of one J. D. Wilson, and was by said Wilson duly endorsed prior to its delivery to the plaintiff.

The affidavit of merits verified the execution of the instrument sued on, but denied that defendant had received any consideration for the note even if the sum of $5000. It further set up that under the law of Kentucky, 1910, J. D. Wilson was the agent of a certain mining company and the part of one Cotter, who was the owner of that company; that Cotter and Wilson entered into negotiations with the defendant for the purpose of selling and delivering and causing transferred with his property of the stock of said corporation; that the mining property in question had value to the organization of the corporation, and the consideration for the note sued on; that Cotter and Wilson entered into a contract with the defendant by the terms of which defendant was to turn over his entire stock with Cotter, who agreed to sell [illegible] over the properties, to the understanding [illegible] that he would put in this stock (4000,000 of the stock of the corporation in exchange for $5000.00 of the money to be paid by the defendant to Cotter; that Cotter entered into an agreement with the said Wilson whereby he agreed to form a corporation to take over his entire property [illegible] to sell to the public at large; that the property was not to be leased to [illegible] of persons known as "The Jenkins Heirs;" that Cotter entered into a contract with the said Wilson whereby he agreed to form a corporation to take over his entire property [illegible] to sell to the public at large; that the property was not to be leased to [illegible] of persons known as "The Jenkins Heirs;" that Cotter entered into an agreement with the said Wilson whereby he agreed to form a corporation to take over his entire property [illegible] to sell to the public at large; that the property was not to be leased to [illegible] of persons known as "The Jenkins Heirs;" that Cotter entered into

accounted for; that the stock and deeds were placed in escrow for that purpose, and that when $25,000 had been paid to said heirs the deeds would pass to the corporation for the purpose of record; that the corporation had no other property of value; that Potter agreed to make certain deferred payments to the heirs, and in the event of failure so to do, the agreement to transfer all properties was to become null and void and the property lost to the corporation; that prior to June 1st, 1919, Potter and others had made all the accrued payments as agreed; that defendant made an agreement with I. G. Wilson as the agent of Potter and the mining company, whereby defendant in behalf of himself and others was to purchase 600,000 shares of said stock on condition that defendant's mining engineer should find certain representations made with reference to the property to be true; and if the same should be found satisfactory to defendant; that the plaintiff was a stockholder and director of the mining company and had knowledge of all these facts; that Potter was about to default on one of the payments to the Jenkins heirs, whereby the property would be lost; that plaintiff urged defendant to make a trip to the property speedily; that defendant was advised by Wilson that he had talked with the plaintiff and that if defendant would make the note for the amount needed by Potter and the corporation he, Larson, would raise the money on said note for this purpose; that plaintiff was advised by Wilson of the circumstances under which he was making the note, which it was agreed would be returned to him if the property should not be satisfactory to defendant; that on the 24th day of August, 1919, defendant visited the properties, which were not as represented; that he thereupon notified the company that he would not proceed, and demanded the return of the note or the equivalent thereof, which was refused,

option was refused.

and demanded the return of the rain or the cash amount thereof,
that he thereupon notified the company that he only [illegible] insured,
defendant claiming that [illegible] was not [illegible]
satisfactory to defendant; that on the [illegible] at Mount Ida,
was ripened enough to be entered in the [illegible] might not be
of the circumstances under which he was carrying the note, which it
said note for this purpose; that plaintiff was induced by fifteen
Potter and the company [illegible] same, [illegible] would issue the money on
and that if defendant would make the note or the amount needed by
tendered was refused by [illegible] then called with the plaintiff
named defendant to make [illegible] in the county [illegible] that de-
Jenkins being, whereby the said note would be [illegible] that plaintiff
that Potter was about to default in [illegible] to the
vester of the minor [illegible] and had knowledge of [illegible] these facts;
property to defendant; that the plaintiff was a stockholder and di-
to the property in the event it was once placed to [illegible] amount
amounts [illegible] performance [illegible] with reference
600.00 shares of said stock on condition it [illegible]'s sterling
agency [illegible] to which [illegible] was [illegible] to purchase
with I. O. Wilson as the agent of Potter and the mining company,
the insured property be insured; that [illegible] with an [illegible]
tion; that prior to June 1st, 1913, Potter and others had made all
was to become null and void and the property lost to the corpora-
event of failure so to do the [illegible] agreement to transfer all properties
mined to make certain deferred payments to the Nuria, and in the
that the corporation had no other property of value; that Potter
the deeds would [illegible] for the purpose of recording;
that purpose, and that when $25,000.00 had been paid to said Nuria
accounted for; that the stock and deeds were placed in escrow for

The parties submitted their evidence tending to sustain their respective contentions. The cause was tried by the court without a jury and a finding for the plaintiff in the full amount of the note was made and judgment entered thereon.

On the trial the plaintiff testified that he bought b the note from I. G. Wilson and gave him a cashier's check therefor, of $3,000. The check was produced and is in evidence, dated June 9, 1919. Plaintiff further testified that the only talk he had with Wilson at the time "was to cash that note for him and give him the money for it." Plaintiff was later called by the defendant under section 33 of the Municipal Court act, and denied in detail any such knowledge as was set up in defendant's affidavit of merits, but on the contrary said that three or four days after the transaction the defendant told him, "you can be sure you get your money."

Defendant testified as to the circumstances under which the note was made and delivered, his testimony in general tending to sustain the allegations of the affidavit of merits. Wilson also testified and Potter's deposition was taken.

We think it is established by a preponderance of the evidence that the defendant knew when he made the note that it was to be negotiated and the proceeds thereof used in paying the expenses of his trip to the mines and in making payment to the Jenkins heirs. The evidence does not establish that the note was to be returned to him in case his examination of the property proved to be unsatisfactory, or that it was delivered upon such condition. Section 52 of the Negotiable Instruments Act, Hurd's Rev. Stat. 1919, p. 2028, provides:

The parties submitted their evidence tending to sustain their respective contentions. The cause was tried by the court without a jury and a finding for the plaintiff in the full amount of the note was made and judgment entered thereon.

On the trial the plaintiff testified that he bought the note from I. G. Wilson and gave him a cashier's check therefor, of $2,000. The check was produced and is in evidence, dated June 9, 1910. Plaintiff further testified that the only talk he had with Wilson at the time "was to cash that note for him and give him the money for it." Plaintiff was later called by the defendant under section 34 of the Practice Court Act, and denied in detail any such knowledge as was set up in defendant's affidavit of merits, but on the contrary said that three or four days after the transaction the defendant told him, "You can be sure you set your money."

Defendants testified as to the circumstances under which the note was made and delivered, his testimony in general tending to sustain the allegations of the affidavit of merits. Wilson also testified and letter's deposition was taken.

We think it is established by a preponderance of the evidence that the defendant knew when he made the note that it was to be negotiated and the proceeds thereof used in [illegible] the expenses of his trip to the Wilson ranch in Montana, except to the extent to which the note was returned to him upon cancellation of the deposit [illegible] to be returned, or [illegible] was delivered upon such condition. Section 34 of the Practice Act [illegible] Ward's Rev. Stat. 1910, p. 2[illegible]8, provides:

> "A holder in due course is a holder who has taken the instrument under the following conditions, first, that the instrument is complete and regular upon its face. Second, that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact. Third, that he took it in good faith and for value. Fourth, that at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it."

Section 55 of the same act provides in substance that the title of a person who negotiates an instrument is defective within the meaning of the act when he obtains the instrument or any signature thereto by fraud, duress, force and fear or other unlawful means or for an illegal consideration; or when he negotiates it in breach of faith, or under such circumstances as amount to fraud. Section 56 provides in substance that to constitute notice of infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual notice of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith. Section 57 provides that a holder in due course holds free from any defect of prior title and free from defenses except as therein noted; no one of which defenses is claimed here.

The evidence as we read it shows without contradiction that the note was given by defendant to Wilson for the express purpose of being negotiated, and that money might be obtained thereon, as before stated. While the evidence also shows that the parties agreed that if upon examination defendant decided not to buy the property, the amount of the note should be returned to defendant, it does not tend to show that either the note or the amount of it was to be returned by Larson. The promise to pay is unconditional, and even if parole evidence were admissible to vary the terms of the note, which it is not (Miller v. Wells, 46 Ill. 46; Mosher v. Rogers, 117 Ill. 446; Shultz v. Meyer, 181 Ill. App. 335), such

v. Rogers, 174 111, 466; Phelps v. Tower, 191 111. [illegible] 239). Owner of the note, whether it is not (Elliot v. [illegible], 46; Hooper

[illegible] and even if proofs of these acts relating to [illegible] torney of it was to be returned by [illegible]. The failure to [illegible] ment, it does not lend to show [illegible] or the [illegible] the property, the amount of [illegible] tion warned the [illegible] documents due and did not to pay on, as before stated. While the evidence [illegible] that the [illegible] mance of being [illegible], and [illegible] close that the note was given by defendant [illegible] for the expired [illegible] of [illegible]

The evidence of the [illegible] shows [illegible] consideration from defendant to [illegible] in due course [illegible] from any defect of value [illegible] instrument [illegible] to bad faith. [illegible] provides that a holder in [illegible] or bad " or if the bill [illegible] in taking the [illegible], or knowledge of any [illegible] notice of [illegible] or defect, the [illegible] must have had [illegible] notice of the infirmity or defective title of the person [illegible] the note, the burden to show it [illegible] notice of [illegible] — the [illegible] or defect in the [illegible] to [illegible]. Section 56 [illegible] in an action that to obtain negotiate it in breach of faith, or under circumstances [illegible] amount to fraud. Section 56 provides that to constitute notice of infirmity in the [illegible] or defective title of [illegible] any [illegible] fact or other circumstance [illegible] to [illegible] or for an illegal consideration; in [illegible] to obtain the [illegible] by fraud, duress [illegible] force and fear or other unlawful means or for an illegal consideration; in [illegible] no-

> "A holder in due course is a holder who has taken the instrument under the following conditions, first, that the instrument is complete and regular upon its face. Second, that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact. Third, that he took it in good faith and for value. Fourth, that at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it."

Section 56 of the same act provides in substance that

the title of a person who negotiates an instrument is defective

within the meaning of the act when he obtains the instrument or

any signature thereto by fraud, duress [illegible] force and fear or other

agreement would not, as we read the statute, prevent a recovery under the facts which here appear.

Section 29 of the Negotiable Instruments Act, supra, provides that an accommodation party is one who has signed the instrument as maker, drawer, acceptor, endorser, for the purpose of lending his name to some other person, and that such party is liable on the instrument to a holder for value notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party; and in case a transfer after maturity was intended by the accommodation party, notwithstanding such holder acquired title after maturity.

We think, under the undisputed facts of this case, that defendant was an accommodation maker, and that the plaintiff could recover. The judgment is therefore affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

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FRANK E. ROTH,
Appellee,

vs.

CHARLES H. HILL and HORACE WRIGHT COOK,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

232 I.A. 638[3]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellants here, who were defendants below, were sued by plaintiff there, the appellee here, in an action of assumpsit. The declaration consisted of the common counts. Attached thereto was an affidavit which alleged that the plaintiff's claim was on account of money belonging to the plaintiff which "is unlawfully and tortiously held and retained by the defendants to the amount of $5,709.17." The declaration was filed July 30th, 1918. By a bill of particulars subsequently filed the plaintiff set up that prior to August 31, 1916, the estate of Martha S. Hill was the owner of certain real estate in the city of Chicago, Cook County, Illinois; that the defendants were trustees of said estate; that plaintiff, acting as agent for said estate, leased said real estate and was entitled to commission of $9,668.71, from which sum there were deducted certain disbursements, amounting to $1,104.96, leaving due to the plaintiff for his commissions the sum of $8,563.75; that the defendants on August 31, 1916, came into the possession of said last named sum of money, and that out of said sum on that date they paid to plaintiff $2,854.58, and withheld and retained the balance, amounting to the sum claimed.

The defendants each filed separate pleas of the general issue, and each by affidavit set up that he had a good and meritorious defense to the whole of plaintiff's claim, which was stated to be

that they did not tortiously withhold and retain money belonging to the plaintiff; that they were not indebted to the plaintiff in any sum whatsoever, as alleged by him; and that, if plaintiff was ever entitled to any compensation for service rendered the estate or to the defendants, he had been fully compensated and paid. The issues as then made up were tried by jury. At the conclusion of all the testimony the defendants asked an instruction to find the issues in their favor, which was denied. The jury found the issues for the plaintiff and assessed the plaintiff's damages at the sum of, $5,616.58, and the court, overruling a motion for a new trial, entered judgment on the verdict.

Under appropriate assignments of error the defendants contend here that under the facts of the case, first, no joint judgment by which each of the parties became liable for the whole of the amount can be sustained, and that this defense was available to defendants under the plea of the general issue, although no plea denying joint liability was filed. Secondly, they further contend that the verdict and judgment are manifestly against the weight of the evidence, and that a new trial should have been granted by the court for that reason. These contentions require an examination of the evidence.

The evidence submitted in plaintiff's behalf rests primarily upon his own testimony, although it is contended that the plaintiff's version of the transaction is corroborated by evidence submitted on behalf of the defendants. The defendants were executors and trustees of the estate of Martha G. Hill. The estate owned a piece of property in the city of Chicago, which it was considered would be ideal for warehouse purposes provided it had proper railway facilities. This property adjoined the Northwestern Railway Company's tracks. Plaintiff undertook to secure

that they did not tortiously withhold and retain money belonging to the plaintiff; that they were not indebted to the plaintiff in any one whatsoever, as alleged by him; and that, if plaintiff can ever entitled to any compensation for services rendered the estate or to the defendants, he had been fully compensated and paid. The issues as then made up were tried by jury. At the conclusion of all the testimony the defendants asked an instruction to find the issues in their favor, which was denied. The jury found the issues for the plaintiff and assessed the plaintiff's damages at the sum of, $5,010.30, and the court, overruling a motion for a new trial, entered judgment on the verdict.

Under appropriate assignments of error the defendants contend here that under the facts of the case, first, no joint judgment by which one of the parties became liable for the whole of the amount due is sustained, and that this defense was available to defendants under the plea of the general issue, (it ought no plea denying joint liability was filed). Secondly, they further contend that the verdict and resultant judgment against the weight of the evidence, or that the record should have been remanded by the court for that reason. There exists no conflict on examination of the evidence.

The error complained in plaintiff's brief under the statement, although it is contended that the plaintiff's version of the transaction is denied or explained by evidence adduced on behalf of the defendants. The defendants were executors and trustees of the estate of Mrs. [illegible]. The estate owned a piece of property in the city of Clinton, a ten [illegible] had [illegible] for waterhouse purposes for [illegible] was considered unfit to lease for waterhouse purposes and [illegible] western Railway Company [illegible] a trucks. [illegible] to secure

these railway facilities and to secure a lease of these premises for warehouse purposes. He succeeded in doing so, and on June 1, 1916, rendered a bill to the trustee for the sum of $9,668.91, as broker's commissions for his services in that regard. On August 30, 1916, defendant Hill drew the check of the estate for that amount to the order of the plaintiff, which check was delivered to plaintiff by the defendant Cook in Cook's office in the Stock Exchange building on August 31, 1916. While plaintiff had been about this work certain advances had been made to him, which it had been agreed should be paid out of these commissions, when earned. After the check was handed to plaintiff he, plaintiff, expressed a doubt as to whether the cashier of the bank would cash so large a check at plaintiff's request. Thereupon defendant Cook endorsed the check and put his O. K. to plaintiff's endorsement of it. Plaintiff then went to the bank, presented the check to the paying teller, was paid the amount, and brought the money back to Cook's office. Plaintiff testifies:

> "After the check was cashed I took it to Mr. Cook's office and laid it on the table, and I said, 'There it is.' He said, 'Well, we will get these cash items and figure it up.' He took the cash items and counted them up, and took that amount of money out of the bills, and then when that was done, he made three piles and said, 'Two-thirds for Hill and myself and 1/3 for you,' and I said, 'Where do you get that stuff?' He said 'That's the way it has got to be,' and he did it, and put the balance in the drawer and closed it up. I said, 'I won't stand for it, it was either my money or not a cent was my money.' I said, 'The estate paid it. It is a fine way for two trustees to act. It either belongs to me or to the estate.' I made quite a little stay in the office, was angry about it, but could not help myself because he had leverage over me, for he was a director in the company of which I was secretary and that company owed me money for raising $500,000."

Asked on cross examination whether prior to the time the division was made anything was said, or was there any agreement between plaintiff and defendants that the commissions should be split equally between them, plaintiff denied any such agreement or conversation.

those railway facilities and to secure a lease of these premises for warehouse purposes. We succeeded in doing so, and on June 1, 1910, rendered a bill to the trustee for the sum of $9,000.91, on Auguste broker's commissions for his services in that regard. On August 30, 1910, defendant Hill drew the check of the estate for that amount to the order of the plaintiff, which check was delivered to plaintiff by the defendant Cook in Cook's office in the Stock Exchange building on August 31, 1910. Shortly thereafter had been earned. After the check was handed to plaintiff he, plaintiff, expressed a doubt as to what or the outlet of the bank would soon be large a check at it. Hill's request. Thereupon defendant Cook endorsed the check and said: ", to plaintiff's endorsement of it. He left then went to the bank, cashed the check and brought the money out of the bill', and then that was done, he made three piles and said, 'Two-thirds for Hill and myself and 1/3 for you,' and I said, 'Where do you get that stuff?' He said 'that's the way it has got to be,' and to do it. And put the balance in the drawer and closed it up. I said, 'I won't stand for it, it was either my money or not a cent was my money.' I said, 'The entire bill. It is time way for two thirds to act. It either belongs to me or to do end to.' I made quite a talkie both I the bill', the [illegible] but could not hold myself because he had [illegible] and that company used me money for writing [illegible]."

Asked on cross exa[illegible] to [illegible] time the division was made explain[illegible] had, or was [illegible] between plaintiff and defendant the [illegible] money [illegible] split equally between them. Plaintiff denied any such agreement or commission.

The plaintiff further testified on cross examination that there was no difficulty between him and defendant Cook as to the settlement of the cash items; that those amounts were advanced made to him, and in case the scheme did not go through he was to work it out in some way. He further testified that he made no further mention of the matter to either defendant from the time it occurred (the 31st day of August, 1916) until the latter part of January, 1918, although he repeatedly met them both and did business with them during that time. Repeating on cross examination the occurrence at the time his money was taken from him, as he alleges, he said, "I had the money on the check, I don't think over fifteen minutes when I came into Cook's office and said, 'Here is the money.' I said, 'Let's settle up the cash tickets,' and I laid the money on the desk. Mr. Cook took it and counted it, then he began figuring the cash items, then he took the amount of the cash items out of the money, then he took the amount of money out and split it in three ways, that as into three equal parts, and said 'Here is yours,' and the other two-thirds belongs to Charlie Hill and myself.' I said, 'Where do you get that stuff?' He said, 'Two-thirds belongs to us and one-third is yours.' I said, 'I won't stand for it.' That is all he said, and he took it, that is, two of the piles. He handed me the other one. I took it. I said, 'I don't know where you get this stuff, this is fine treatment; it belongs to me. I ought to have all of it or the estate, one or the other. You are acting as trustees of the estate, and here you are grafting two-thirds of it here.' There was nothing else for me to do, because I figured that half a loaf is better than none. I said, 'I will get the other two-thirds later on.' * * * I took the one-third and went back to my office alone, leaving Mr. Cook in the room. He put the money in his desk drawer and locked it up. I don't recall whether I saw Mr. Cook that day again or not."

don't recall what else I saw. Come that day again or not."

room. He put the money in his desk drawer, locked it up. I

third and last [illegible] office [illegible] door in the

'I will get the or two-thirds[illegible]on.' [illegible]

do, because I figured that half a loaf is better than no[illegible] money. I said,

[illegible] two-thirds of it here.' There was [illegible] to

other. You are asking an [illegible] of the [illegible], and [illegible] you are

beholden to me. I ought to have [illegible] of it or [illegible], one or the

'I don't know where you get this nuts', this is [illegible]; it

two of the pizza. He handed me the other one [illegible]. I said,

won't stand for it.' That is all he said, [illegible] he took it, that is,

'Two-thirds belongs to me and one-third is yours,' I said, 'I

and myself.' I said, 'Where do you get that at [illegible]' he said,

'Here is yours,' and the other two-thirds belongs to Charlie Hill

slips it in three ways, (I can also [illegible] two or three, and said

items out o the money, then he took the amount of twos, cut and

began figuring the cash items, then he took the amount of the cash

the money on the desk, Mr. Cook took it and counted it, then he

money.' I said, 'Let's settle up the cash ticket,' and I laid

fifteen minutes when I came into Cook's office and said, 'Here is

Jones, he said, "I had the money on the check, I don't like over

the occurrence at the time his money was taken from him, as he al-

mose with them during that time. Beginning on cross examination

January, 1918, although he recognized my face both and did busi-

curred (the 31st day of August, 1918) until the latter part of

ther mention of the matter to either defendant from the time it oc-

work it out in some way. He further testified that he made no ter-

made to him, and in case the echore did not go through he was to

the settlement of the cash issue; that those amounts were advanced

that there was no difficulty between him and defendant Cook as to

The plaintiff further testified on cross examination

On the contrary Cook testifies that defendants joined with plaintiff in the efforts to develope the property, and that plaintiff said he would divide with Hill and witness, one-third to each, of the amount he would receive, but that he, plaintiff, was not in a financial condition to take care of himself during the time that he was working on the project, and therefore, he would have to have his living expenses paid; that he said he would need at least $30 a week, and the defendants agreed to pay him that amount during the time that he was working upon this plan, and all expenses that might be necessary as he went along; that the Northwestern Road at first refused to put in the switch tracks, and plaintiff and defendants quit working on the proposition; that plaintiff afterwards came back and told them that he could get the Northwestern to recommend to the Common Council the passing of an ordinance that would give them the right to put in the switching facilities; that the matter was thereupon again taken up, and interviews were had with various aldermen with reference thereto; that a corporation was organized, of which plaintiff was made secretary; that defendants continued to pay plaintiff $30 a week and advanced money for dinners, banquets, campaign expenses, etc., at which the matter was promoted; that up to the time plaintiff began to receive $50 a week as secretary of the company, defendants paid him $30 a week. This witness testified that on August 31st plaintiff himself figured the different items of expense, subtracted them from the amount of the commission and divided the balance into three parts. He says, "Mr. Roth figured up the amount of the expenses, subtracted it from the total commission, divided the commission into three parts, which established the amount of two-thirds, then added to that the amount of these expenses, and counted out the money, and handed it over to me, which was for the expenses, that is, it was to replace these expenses that we had paid out in

On the contrary Cook testifies that defendant is joined with plaintiff in the effort to develope the property, and that plaintiff said he could trivide with Hall and Watson, one-third to each, of the amount he would receive, but that he, plaintiff, was not in a financial condition to take care of himself during the time that he was working on the project, and therefore, he would have to have his living expenses paid; that he said he would need at least $30 a week, and the defendants agreed to pay him that amount during the time that he was working upon this plan, and all expenses that might be necessary as he went along; that the Northwestern Road at first refused to put in the mailing trucks, and plaintiff afterwards came back and told them that is could get the ordinance that would give them the right to put in the switching facilities; that the matter was thrown on plaintiff then, and interviewed were had with various officials relative thereto; that a corporation was organized, as which plaintiff was made secretary; that defendants continued to pay plaintiff $30 a week and advanced money for dinners, lunches, carfare, hotel expenses, etc., at which time plaintiff became to receive $30 a week as secretary of the company, defendants to pay him $30 a week. This attorney testified that it was just plaintiff signed first with the difficulties of getting, expenses, then from the amount of the commission and divided the balance into three parts. It says, "Mr. Doth figured up the amount of the expenses, subtracted it from the total commission, divided the remainder into three parts, and determined that I was entitled to one-third, then added to that the amount of them expenses, and counted out the money, and handed it over to me," referring to the defendant, that is, it was to pool on those expenses that it was paid out in

the early part of that year, one-third for Mr. Hill and one-third for myself. I first saw the money he had in my office after he had figured up the amount of the expenses, and the amount of the two-thirds. Before the figuring was done, I had not seen the money at all; the figures had been brought out; Mr. Roth took the money out of his pocket, counted out the money that was due in accordance with the figures, and handed it over to me. I did not have in my hands at any time during that interview the whole amount of money that he brought in; I did not count it; I counted the amount he paid over to me; I never had the third, which he kept, in my possession." The witness further testified that he put the money in the drawer of his desk, including the expenses and two-thirds of the balance; that he did not lock the drawer; that plaintiff at no time made any objection; he, plaintiff, made the division of the money himself; that he did not say, "Where did you get that stuff?" that as a matter of fact, after the division was made, the two went out together; that no claim was made on him by plaintiff until eighteen months later, when plaintiff asked the witness to give him his proxy to vote his stock in the storage company; that the witness told him he would be present and vote the stock himself, and that plaintiff then said that if the witness did not give him the proxy, "I will demand of you the repayment of the money that I gave you at the time the commission was received;" that plaintiff then left the room, and that he had no further conversation.

The defendant Hill testified that he first met plaintiff in July or August, 1913; that he, plaintiff, then came to defendant and asked about putting up a building on the Kinzie street property; that he, plaintiff, said, "We would try to promote the company and split three ways," that is the substance of what he said; that he, Hill, was not present when the money was brought in Cook's office;

Hill, was not present when the money was handed in Cook's office; that no other person was, and handed it over to me. I did not have in my pocket at any time during that interview the whole amount of money with the figure, and handed it over to me. I did not have in my pocket or his pocket, counted out the money that was due in accordance at all; the figure had been brought out; Mr. Both took the money two-thirds. Before the figuring was done, I had not been the money and figured up the amount of the exchange, and the amount of the for myself. I first saw the money be had in my office after he the only part of that year, one-third for Mr. Hill and one-third

The defendant Hill testified that he did not plaintiff had no further conversation.

that if the witness did not give him the proxy, it will demand of him the redemption of the stock himself, and that plaintiff then went present and vote the stock himself, and that plaintiff then went stock in the storage company; that two witness told him he would be when plaintiff asked the witness to give him his proxy to vote his no claim was made on him by plaintiff until eighteen months later, fact, after the division was made. The two went out together; that he did not say, "Where did you get that stock?" that we a matter of tion; he, plaintiff, made the division of the money himself; that he he did not look the drawer; that plaintiff at no time made any objec- his desk, including the expenses and two% rds of the balance; that the witness further testifies that he put the money in the drawer of over to me; I never had the thing, either he kept, in my possession." that he brought in; I did not count it; I counted the amount he paid

that a long time after, witness did not remember the date, but after the organization of the company, he met the plaintiff by appointment, when plaintiff told him he was not going to let Mr. Cook "get away with the ego;" that he was sorry to bring him (Hill) into it, but he was going to get even with Cook if it took every bit of money that he had.

The witness further testified with reference to the allowance per week, that was made to the plaintiff, and produced the checks showing such payments. On cross examination the witness reiterated that in frequent conversations between himself, the plaintiff and defendant Cook, it was said that the commission would be split three ways, and that defendants were to put up the money until it was accomplished, if possible. The witness Huff, a partner of Cook in the practice of law, testifies that on the 31st day of August, 1916, he was in his office adjoining the office of Cook; that he did not hear the conversation between Cook and plaintiff, but did have a conversation with the plaintiff in regard to that interview and the division of the money; that later in the day, in the absence of Cook, the plaintiff came back to the office and said to witness, "What do you think that man Cook did? I said, 'I don't know.' He said, 'Come in here, I want to show you,'" and that he took the witness into Cook's office, opened the drawer of Cook's desk and said, "Cook left here today, and there is about $6,000 in that drawer." Plaintiff further said to the witness they had just divided the commission on the lease, and that witness then went out in the presence of plaintiff, and told the stenographer to close Cook's door, and under no circumstances allow any one to enter his office until he should return. The witness further testified that the firm of Huff and Cook had loaned $300 to plaintiff, of which he had repaid $100; that he afterwards called plaintiff up and asked him to repay it;

that he afterwards called Plaintiff up and asked him to relay it; and Cook had learned of the plaintiff, or [illegible] should return. The witness left on [illegible] under no circumstances at no time would he write out [illegible] of Plaintiff', and told the stenographer to close Cook's door and [illegible] Plaintiff smiled to [illegible] Cook "Cook isn't here today. [illegible] here in about it." [illegible] "Come in here, I want to [illegible] Cook's office, opened the drawer of Cook's desk and said, 'Come into Cook's office. Open the drawer of Cook's desk and say [illegible]

"What do you think that Cook did? I said, 'I don't know.' He said, 'Come in here, I want to show you,' and [illegible] of Cook, the Plaintiff came back to the office and put [illegible] and the dictation of the memo; that Taylor in the day, to the [illegible] have a conversation with the Plaintiff in regard to first [illegible] he did not have the conversation between Cook and Plaintiff, but did [illegible] 1916, he was in the [illegible] the office of Cook; that Cook in the practice of law, [illegible] on the [illegible] of August, 1916, he was in the [illegible]. The witness Burt, a partner of it was necessitated. It [illegible]. The witness Burt, a partner of split three ways, and that defendants were to put up the money until Burt and defendant Cook, it was said that the commission would be itemized that in the [illegible] statement between himself, the Plaintiff checks showing such payments. On cross examination the witness remembered for weeks, that was made to the Plaintiff, and produced the [illegible].

The witness further testified with reference to the statement that he was sure Cook if it took every bit of money that he had.

was going to get even with Cook; that he was sorry to break him (Bill) into it, but he with the exception; that he was not going to let Mr. Cook "get away when Plaintiff told him he was not going to let Mr. Cook "get away the examination of the company. He met the Plaintiff by appointment, then a long time after attorneys had not remembered the date, but after

that at that time plaintiff said that Cook had double crossed him; that in the original arrangement they had agreed to divide each one-third; that plaintiff was to pose as a capitalist, but that Cook had told parties with whom they were dealing that instead of plaintiff being a capitalist, he was working for Hill and Cook at $30 a week, and had thus spoiled his chances of getting a big thing out of the Central Cold Storage; that up to that time he had intended to divide everything three ways with Hill and Cook, but now he would not get a damned cent of his; that he was going to get everything he could out of it, and they could paddle their own canoe; and that later plaintiff told him that he did not have to give Hill or Cook any part of the commission; that he cashed the check and could have kept the whole of it if he had wanted to do so, but felt they had done good work and helped him out when he needed it, and so he had brought the money over and given it to Cook, adding, "I am going to get even with that fellow if it takes the longest day of my life."

In rebuttal plaintiff denied the conversations to which Huff testified.

The appellants invoke the rule laid down in Peaslee v. Glass, 61 Ill. 94; Haycraft v. Davis, 49 Ill., 455; Dick v. Swenson, 137 Ill. App. 68, and the subsequent cases adhering to that rule. They say a new trial should have been granted because the verdict rests upon the unsupported testimony of the plaintiff, which is positively contradicted by the defendants. Appellee contends that there is no absolute rule that the unsupported testimony of the plaintiff will not sustain an action, citing Maggart v. Peoria Ry. Co., 179 Ill. App. 229; Knowles v. Knowles, 86 Ill., 6; Cook v. Wolf, 296 Ill., 36. He also says the bill of exceptions, being a pleading of the appellants, must be taken most strongly against

that at that time plaintiff said that Cook had double crossed him; that in the original arrangement they had agreed to divide each one-third; that plaintiff was to have as a capitalist, but that Cook had told parties with whom they were dealing that instead of plaintiff being a capitalist, he was working for Bill and Cook at $20 a week, and had thus evaded his obligation of putting a big thing out of the Central Gold Storage; that by so that time he had intended to divide evenly [illegible] with Bill and Cook, but now he would not get a dollar and cent of it; that he was going to get everything he could out of it, and they could waddle their own ounce; and that later plaintiff said him that he did not have to give Bill or Cook any part of the commissions; that he cashed the check and could have kept the whole of it, he had wanted to do so, but felt they had done good work and deserved him out when he needed it, and so he had given of the money over and above it to Cook, adding: "I am going to get even [illegible] it takes the longest day of my life."

In rebuttal plaintiff denied the conversation to which [illegible]

The plaintiffs invoke the rule [illegible] v. Bowden, 91 Ill. 94; Buckwalt v. Young, 49 [illegible] Peck v. Thompson, 129 Ill. [illegible] 49, and the subsequent change [illegible] to that rule. They say a new trial should have been [illegible] because the verdict [illegible] manifestly contrary to the [illegible], which is conceded that there is no conflict [illegible] the material [illegible] the defendants. [illegible] contends that plaintiff will not [illegible] a right [illegible] v. Davis 74 Ill. 220; Ingram v. Dawson, 91 Ill. 251; Cook v. Co., 120 Ill. 39. 249; Ingram v. Dawson, 91 Ill. 251; Cook v.

appellants; Graham v. Hammann, 270 Ill. 259; that the plaintiff is entitled to the benefit of the proof introduced by the defendants; Goldie v. Werner, 151 Ill., 554; that evidence brought out on cross examination and not stricken out on motion, whether responsive or not, remains in the record as proof; Steel Sales Corporation v. Industrial Commission, 293 Ill., 439; that the plaintiff is entitled to the benefit of every fact proved, and of every inference favorable to him arising from the evidence. Ames & Frost v. Strachburski, 145 Ill., 196. All these last named points may be conceded. We have given due consideration to them. Yet upon a review of the whole of the evidence, we conclude that the verdict in this case is clearly against the weight of the evidence, and that a motion for a new trial should have been granted upon that ground. This is not alone because the verdict rests upon the uncorroborated testimony of the plaintiff, which is denied by the defendants, who are in turn corroborated by the testimony of Huff, but also because the plaintiff tells a story which is improbable. It is improbable that he would have brought the currency to the office of Cook and turned it over to him in the manner which he relates, if he were in fact the owner. It is highly improbable that one who knew he had an absolute right to such an amount of money would have quietly acquiesced in the attempt of another to appropriate that money to his own use. It is improbable that after such a wrong as plaintiff testifies to, had been committed, the wronged person would for more than a year meet from day to day those who had thus wronged him, without even speaking of the matter to them. Plaintiff gives a plausible excuse as to one defendant, but not the other. The checks which are in evidence tend to corroborate defendants' version of the transaction. Their narrations are more probable and consistent. We therefore think that as the verdict is manifestly against the weight of the evidence, the court should have granted a new trial.

9

of the evidence, the court should have given the view [illegible]. Therefore it may that on the voir dire it unfortunately [illegible] the weight to be given to the evidence in question. There were no [illegible] examination. No matter how in evidence may be [illegible] version of the plaintiff's accuse us to one code of [illegible], but not the other. The choice without even speaking of the matter to them. [illegible] given a year next four day to duly [illegible] and thus wronged him, [illegible] to, had been committed, the accused woman would for more his own use. It is impossible that [illegible] a woman as plaintiff [illegible] advanced in the attempt of motive to [illegible] to it money to an absolute right to such an amount of money, [illegible] the unlikely assumed it over to him in the manner with [illegible] be real[illegible], if he were to that he would have brought the customary to the office of Clerk and the plaintiff tells a story which is impossible. It is impossible are in turn corroborated by the testimony of [illegible], but they become testimony of the plaintiff, which is de led by the defendant, who This is not alone because the weight rests upon the uncorroborated a motion for a new trial should have been granted & on that ground. in this case is clearly against the weight of the evidence, and that review of the whole of the evidence, we conclude that the verdict be concluded. We have given due consideration to them. Yet upon a v. Dirnenberger, 143 Ill., 196. All these just named to us may influence favorable to him arising from the evidence. See Kent Corporation v. Industrial Commission, 291 Ill., 430; that the plaintiff is entitled to the benefit of every fact proved, and of every reasonable or not, reason is the record as proof; Steel Belton on cross examination and not explain out on motion, whether ante; Dolbie v. Kenney, 151 Ill., 304; that evidence brought out opposite; Graham v. Newman, 270 Ill. 239; that the plaintiff is entitled to the benefit of the proof introduced by the defend-

We are also of the opinion under the facts as disclosed by the evidence, that plaintiff failed to show a joint liability. This defense defendants could avail themselves of, although there was no special plea. Imperial Hotel Co. v. Claflin, 175 Ill., 119; Supreme Lodge of United Workmen v. Zuhlke, 129 Ill. 298. It does not appear, on plaintiff's own testimony, that Hill participated in the conversion of plaintiff's money. It was uncontradicted that he received from his codefendant only one-half of the amount which plaintiff claims was improperly held by Cook, and that he was not present at the alleged conversion. Plaintiff waived the supposed tort and sued in assumpsit. He would recover, if at all, on the theory that defendants had and received money which equitably belonged to him. Cook, on plaintiff's theory, would be liable for all. Hill could at the most be liable for only one-half of the sum taken by Cook. But a joint judgment would make Hill liable for the full amount. Hill and Cook were not partners, and the pleadings do not so allege. Nor is there any evidence which could justify a finding that Hill joined in a plan to convert plaintiff's money. A joint action against Hill and Cook, therefore, would not lie. Imperial Hotel Co. v. Claflin, supra; United Workmen v. Zuhlke, supra; Shepardson v. Rowland, 28 Misc., 108; Manahan v. Gibbons, 19 Johns. 427.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

to me also of the opinion under the facts as disclosed by the evidence, that plaintiff failed to show a joint liability. This defense defendants could avail themselves of, although there was no special plea. Imperial Hotel Co. v. Blaffin, 145 Ill. 110; Burgess Lodge of United Workmen v. Lumpkin, 139 Ill. 308. It does not appear, as plaintiff's own testimony, that Hill participated in the conversation of plaintiff's money. It was understanded that he received from him sufficient only one-half of the amount which plaintiff claims was improperly held by Cook, nor that he was not present at the alleged conversation. Plaintiff waived the supposed tort and sued in assumpsit. He could recover, if at all, on the theory that defendants had received money which equitably belonged to him. Cook, on plaintiff's theory, could be liable for all. Hill could at the most be liable for only one-half of the sum taken by Cook. But a joint judgment would make Hill liable for the full amount. Hill and Cook were not partners, i.e. the pleadings do not so allege. Nor is there any evidence which could justify a finding that Hill joined in a plan to convert [illegible] money. A joint action against Hill and Cook, therefore, we do not see. Imperial Hotel Co. v. Claffin, Burgess L. Hotel Lodge v. Lumpkin, supra; Shepardson v. Norwood, 20 Ill. App. 200; Lumpkin v. Fitzsimons, 10 Idem. 492.

For the reasons indicated the judgment will be reversed and the cause remanded.

Mr. [illegible] and Mr. Justice [illegible] concur.

14 - 25853

MICHIGAN STAR FURNITURE CO., a corporation,

Defendant in Error,

v.

GEO. F. KERES LUMBER CO., a corp.,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

223 I.A. 6384

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages claimed to have been sustained by reason of defendant failing to deliver to plaintiff lumber which the latter had purchased. There was a finding and judgment in favor of plaintiff for $218.43, to reverse which the defendant prosecutes this writ of error.

The record discloses that plaintiff was engaged in the manufacture of furniture at Zeeland, Michigan, and the defendant in the lumber business in Chicago; that a representative of defendant called on plaintiff at its factory for the purpose of selling lumber. Thereupon a written order for three car loads of soft elm was made out by plaintiff and delivered to defendant's representative. It provided for the re-sawing of the lumber by defendant before delivery to plaintiff at its factory. One car was to be shipped at once, and the order contained the following: "Subject to shipping orders or cancellation if sample car is received." None of the lumber was ever delivered, and plaintiff being obliged to go into the market and purchase lumber at a higher price brought

Plaintiff in error.

vs.

OSO. P. FRANK DOUGLAS CO., a corporation.

Defendant in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages claimed to have been sustained by reason of defendant failing to deliver to plaintiff timber which the latter had purchased. There was a finding and judgment in favor of plaintiff for $339.43, to reverse which the defendant brought the writ of error.

The record discloses that plaintiff was engaged in the manufacture of furniture at Joliet, Illinois, and the purpose of selling lumber. Thereupon a written order since our touch of self six we have out by plaintiff and delivered to salesman's representative. It directed the re-sawing of the timber by defendant in such quality to plaintiff at its factory. The car was to be shipped at once, and the order contained the following: "subject to shipping or-
der." Upon the arrival of the timber at plaintiff's factory, it was found to be of inferior quality, and plaintiff refused to receive the car. Thereupon a written order for the purchase of selling lumber. Thereupon a written order for the purchase of defendant dated on plaintiff at its factory for the defendant in the lumber business in Chicago; that a representative of the manufacturers at Joliet, Illinois, and the but proceedures this writ of error.

favor of plaintiff for $339.43, to reverse which the Judgment was entered. There was a finding and judgment in favor of plaintiff for $339.43, to reverse which the defendant brought the writ of error.

opinion of the court.

this suit to recover its damages.

There is no complaint to the amount of the damages, but the defendant contends, (1) that the order given by plaintiff for the lumber was never accepted by defendant; (2) that if the defendant had accepted the order, it was not binding because it was unilateral in that it did not require plaintiff to accept and pay for the lumber, and (3) that if there was a binding contract between the parties it was governed by the laws of Michigan and under the Statute of Frauds of that State it was unenforceable because that statute provides that a contract for the purchase of merchandise for $50.00 or more is invalid unless some note or memorandum is signed by the party to be charged, and that there is no such note or memorandum shown by the evidence.

After the written order was delivered by plaintiff to defendant's representative it was sent by the latter to defendant in Chicago and afterwards there was correspondence between the parties in reference to the lumber. The defendant contends that the order was never accepted because the first letter written by defendant to plaintiff, dated February 21, advises plaintiff that defendant had "a letter from our mill" to the effect that they could not re-saw the lumber because the saw used for that purpose was out of repair and could not be used. And it was suggested that they permit defendant to ship the lumber and plaintiff do the re-sawing at a price of $1.00 per thousand feet less than the price mentioned in the order and that from this and other letters passing between the parties it appears that the order was never accepted by the defendant. It would serve no useful purpose to discuss all of the correspondence but we think it sufficient to say upon a careful consideration of it that it clearly appears that both parties throughout the cor-

this suit to recover its damages.

There is no complaint to the account of the counter-
claim by the evidence.

After the writ on which was ordinated by plaintiff to be quashed, and that is to say for variance or misjoinder between the parties in reference to the lumber. The defendant contends that the order was never examined because the first letter written by defendant's correspondence in which was corresponding between time of signing and under the direction of Mr. [illegible] to defendant to accept and pay for the lumber, and (2) that it there was a binding contract between the parties it was governed by the law of Michigan and not the law of that state. It was unnecessary because that simple provides that a contract for the purchase of merchandise for $50.00 or more is void unless more or less or memorandum is signed by the party to be charged, and that is to say for the party to defendant's correspondence it was done by the letter to defendant in Ottawa and afterwards there was correspondence between the parties in reference to the lumber. The defendant contends that the order was never examined because the first letter written by defendant to plaintiff, dated February 27, material plaintiff that defendant had to letter from one will be two offers that they could not re-make the lumber mention the car need for that purpose was out of repair and it could not be used. And it was attempted that they secure defendant's mill lumber and pieces to do the re-examine of a time of it. Our theories is set forth in the answer and that from this time when the price mentioned in the order was from the defendant and other letters pass [illegible] between the parties it appears that the order was never accepted by the defendant. It would make it unlikely to pay the lumber's material cause of it [illegible] no useful purpose to direct all the correspondence for an

respondence treated the matter as though there was a bargain and sale of the three cars of lumber, for the defendant in one of its letters states: "Can you allow us to make a substitution" of a different kind of lumber, and in another asking plaintiff if the order could not be canceled. Whether the order was binding when it was delivered to defendant's representative at Michigan it is unnecessary to decide because there is no doubt but that the correppondence between the parties shows that both plaintiff and defendant considered that there was a binding and valid agreement entered into whereby the plaintiff was obliged to accept and receive three car loads of lumber and the defendant was obligated to furnish it. The contract was, therefore, not unilateral but was bilateral and binding on both parties. Whether the contract was a Michigan or an Illinois contract is immaterial because in no event could the Statute of Frauds apply even if it be considered as a Michigan contract, for there is sufficient memoranda signed to take it out of the statute. The memoranda consisted of the correspondence between the parties.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, J.J. CONCUR.

correspondence treated the matter as though there was a bargain and sale of the three cars of lumber, for the defendant in one of its letters stated: "Can you allow us to make a substitution" of a different kind of lumber, and in another making plain still if the order could not be commended. Whether the order was binding when it was delivered to defendant's representative we think but that the correspondence between the parties is no doubt but that the correspondence between the parties above that both plaintiff and defendant considered that there was a binding and valid agreement entered into whereby the plaintiff was obliged to accept and receive three car loads of lumber and the defendant was obligated to furnish it. The contract was, therefore, not unilateral but was bilateral and binding on both parties. Whether the contract was a Michigan or an Illinois contract is immaterial because in no event could the Statute of Frauds apply even if it be considered as a Michigan contract, for there is sufficient memoranda signed to take it out of the statute. The memoranda consisted of the correspondence between the parties.

The judgment of the municipal Court of Chicago is affirmed.

AFFIRMED.

MR. JUSTICE [illegible] delivered the opinion of the court.

20 - 25909

ALICE HOYMAN,

Defendant in Error,

v.

WILLIAM BIRKHAMP,

Plaintiff in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY

223 I.A. 638

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $3,000 with interest thereon at 6% per annum from December 16, 1909, and $2,000 with interest at the rate of 7% per annum from April 1, 1913. There was a verdict and judgment in plaintiff's favor for $7,746.50 to reverse which defendant prosecutes this writ of error.

The record discloses that plaintiff and defendant had been acquainted for some time prior to the matters involved in this suit; that in 1909 defendant was interested in the Altura Suburban Farms Company, a corporation, and the Altura Suburban Homes Company, a corporation, Colorado companies, and that he induced plaintiff to invest $3,000 in the stock of these two companies, 50 shares of the former and 10 of the latter. Plaintiff's position is that when defendant sought to have her invest the $3,000 he told her that the investment would be safe, but that if it proved otherwise, he would guarantee her against loss and would refund to her the $3,000 with 6% interest. Thereupon the money was sent by plaintiff, who resided in Chicago, to defendant at Denver, Colorado. The certificates of stock were for-

VICK MCKEAN,

Defendant in Error.

ERROR TO

SUPERIOR CT USD.

C.

ALFIVA MCKEAN,

Plaintiff in Error.

CLERK SUPREM

No. 2333 T. 688.

MR. JUSTICE DEAN delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $9,000 with interest thereon at 6% per annum from December 15, 1908, and $5,000 also interest at the rate of 7% per annum from March 1, 1910. There was a verdict and judgment in plaintiff's favor for $17,468.00 in response which subsequent proceedings reduced to a matter of error.

The record discloses that plaintiff was delivered $9,000 in the stock of Sheep Creek Mines Company, a corporation, organized under the Colorado statutes, and that he transferred said stock to defendant. Plaintiff's position is that upon delivery of said stock to defendant he became entitled to receive dividends thereon at the rate of 6% per annum from December 15, 1908, and $5,000 also interest at the rate of 7% per annum from March 1, 1910. There was a verdict and judgment in plaintiff's favor for $17,468.00 in response which subsequent proceedings reduced to a matter of error.

The record discloses that plaintiff was delivered $9,000 in the stock of Sheep Creek Mines Company, a corporation, organized under the Colorado statutes, and that he transferred said stock to defendant. Plaintiff's position is that upon delivery of said stock to defendant he became entitled to receive dividends thereon at the rate of 6% per annum from December 15, 1908, and $5,000 also interest at the rate of 7% per annum from March 1, 1910. There was a verdict and judgment in plaintiff's favor for $17,468.00 in response which subsequent proceedings reduced to a matter of error.

warded to her by the defendant. The stock in the two companies later proved to be worthless and of no value,- and she then demanded that defendant make good his guarantee and repay the $3,000 with interest as agreed. Defendant's position was that he induced plaintiff to make the investment but that he did not guarantee to refund her the money if the venture was not a financial success. As to the $2,000 given by plaintiff to the defendant April 1, 1913, this was evidenced by defendant's promissory note of that date due one year after date with interest at 7% per annum, payable semi-annually. There is no contention that any part of the principal or interest has been paid, but the defense is that the defendant, who afterwards moved to Colorado, went through bankruptcy scheduling this item and he was thereby released from paying this indebtedness.

The instant case was brought in the Superior Court of Cook County June 28, 1918. So far as it is material to be noted, the defendant filed a plea of the general issue and the five year Statute of Limitations and that he had been discharged in bankruptcy of any liability on the promissory note. To these pleas plaintiff replied that on August 23, 1915, and at divers other times after that date the defendant made a new promise that he would pay the plaintiff the amount she claimed. Issues were joined and a trial had before a judge resulting in a verdict and judgment for the plaintiff.

There were only two points of controversy between the parties; (1) whether defendant had guaranteed repayment of the $3,000 in case the investment in the Colorado companies proved a failure, and (2) whether after defendant's discharge in bankruptcy he made a new promise to pay the plaintiff the $5,000 principal and interest which she claims. The only

$2,000 principal and interest which are at issue. The only
issue in controversy may be made a new promise to pay the plaintiff the
proved a failure, and (2) whether defendant's promise to pay the balance
of the $3,000 in case the investment in the Leased Company
the parties: (1) whether defendant had fraudulently induced
There were only two points of controversy between

judge submitted to a verdict and judgment for the plaintiff.
the claim. Issues were joined and a trial had before a
made a new promise that he would pay the plaintiff the amount
1913, and at divers other times after that date the defendant
note. In these plain plaintiff replied that on August 23,
discharged in bankruptcy of any liability on the promissory
and the five year statute of limitations and that he had been
be heard, the interest filed a plea of the general issue
of Cook County June 26, 1919. So far as it is material to

The instant case was pending in the Superior Court
be was thereby relieved from paying this indebtedness.
deforado, went through bankruptcy combining this item and
the defense is that the defendants, who afterwards moved to
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tember April 1, 1913. This was evidenced by defendant's promis-
$2,000 given by plaintiff to the de-
mantuno to return may the money if the venture was not a fin-
be induced plaintiff to make the investment but that he did not
$2,000 with interest as agreed. Defendant's position was that
vended that defendant make good his guarantee and repay the
later proved to be worthless and of no value.- and the then de-
warded to her by the defendant. The stock in the two companies

witnesses in the case were the plaintiff and the defendant, and their testimony together with some documentary evidence was all that was offered or received on the trial.

Plaintiff testified that she had known the defendant since April 4, 1904, at which time she had some business dealings with him; that in November, 1909, she received a letter from defendant, who was then living in Denver, wherein the defendant asked her to send him $3,000 to invest in the Colorado companies; that she had put this letter in a small pasteboard candy box in a trunk where she kept it for a number of years; that she later moved her residence and the trunk was placed in a store-room in the basement; that thereafter there had been a burglary in the store-room, the trunk broken open, and the letter missing. She testified that she remembered the substance of the letter and that in it defendant said: "Kindly send me $3,000 to invest in the Altura Suburban Farms Company shares of stock. I will guarantee you against all loss with the -- will return the $3,000 with six per cent interest thereon should the investment prove a failure. I want control of the company and must have the voting power on the stock of this company."; that upon receipt of this letter she sent defendant a draft for $3,000 and on December 16, 1909, defendant acknowledged receipt of the draft by letter. This letter was offered in evidence and is as follows:

"Denver, Colo. December 16, 1909.

Miss Alice C. Heyman,
Chicago, Ill.
Dear Miss Heyman:

I received your telegram of 14th inst., and today received your draft for $3,000. I enclose herewith following stock.-

50 shares Altura Suburban Farms Co. par value	$5000
10 shares Altura Suburban Homes Co. par value	$1000
par value	$6000

and their testimony relative ~~thereto~~ also was documentary evidence was all that was offered on the trial.

Plaintiff testified that she had known the defendant since April 4, 1926, at which time she and one Benjamin Danielson; that on November, 1929, she received a letter from defendant, who was then living in Denver, wherein the defendant asked her to send him $2,000.00 to invest in the Golden Eagle Company; that she had not $2,000.00 but sent him a small postal money order in a trunk where she kept it for a number of years; that she later moved her residence and the trunk was placed in a storage-room in the basement; that the trunk was not in a storage-room, the trunk (upon open and the letter missing. She identified that she remembered the substance of the letter was (is in defendant exhibit: "Kindly send me $2,000.00 to invest in the Alpine Uranium Mines Company the -- will return the $2,000.00 with six per cent interest thereon shares of stock. Will forward a ~~certificate~~ at once with ~~showing~~ the investment based a ~~venture~~. I want control of the company and must have the voting power on the stock of the company."; that upon receipt of this letter a ~~certificate~~ ~~and~~ a draft for $2,000.00 on ~~the~~ December 10, 1929, which is ~~acknowledged~~ in evidence and is as follows:

"Denver, Colo. December 10, 1929.

Miss Alice C. Bowman,
Chicago, Ill.
Dear Miss Bowman:

I received your ~~certificate~~ ~~for~~ stock.
and money ~~received~~ to be ~~used~~ for $2,000.00. I ~~received~~
Returning ~~herewith~~ ~~receipt~~.
Mr Warren Alpine Uranium Mines Co. par value ___ 2000.00
10 shares Alpine Uranium Mines Co. par value ___ 1000.00
par Value ___ 3000.00

This stock is worth par at least $3,000 today. I believe the book value is $4,000. It is absolutely certain to be worth $3,000 and to greatly increase in value as sales are made. I feel that I will make it worth $5,000 in less than six months, and when all the land is sold it will begin to draw 6% interest.

The Altura Suburban Homes Company is a new company- just bought 120 acres for $30,000.00 with full water rights - the stock I figure will go to $120.00 a share.

The Altura Suburban Farms Co. has been selling. Out of 592 acres something like 300 acres have been sold. When it is all sold the stock will be worth par.

I don't believe that you ever made a safer investment,- it is bound to double and be safe all the time, as every tract sold gets more valuable when improved by the purchaser.

I'll guarantee you against loss, will agree to refund your principal with 6% interest should all my predictions fail, so you are absolutely safe.

I must have the voting power, also desire first option of 10 days on the stock if offered for sale.

I will report progress from time to time.

With a Merry Christmas, I am

Yours very truly,

Wm. Bierkamp, Jr."

With this letter were enclosed the certificates of stock. One certificate was for 50 shares in the farms company, which recited "fully paid and non-assessable", one certificate for nine shares and another certificate for one share in the homes company. These certificates were made out to the defendant and by him endorsed on the back to plaintiff. On their face they recited "fully paid and non-assessable." Plaintiff further testified that on or about March 30, 1912, she received a dividend of $108; that in July, 1915, defendant called on her at her home in Chicago and discussed some other dealings; that prior to this time he told her that the stock in the Colorado companies was worthless and that the mortgage on the farms

This stock is worth par at least $7,000.

I believe the book value is $4,000. It is
absolutely certain to be worth $9,000 and to eventually
increase in value as sales are made. I feel that
I will make it worth $5,000 in less than six months.
and when all the land is sold it will begin to draw
5% interest.

The Alsace Lumber Woods Company is a
new company. Just bought 180 acres for $2,000.00
with full water rights - the stock I figure will go
to $10K.00 a share.

The Ojsta Rubberon Farms Co. has been
selling. Out of 300 acres bordering like 80(acres
have been sold. When it is all sold the stock will
be worth par.

I don't believe that you ever made a safer
investment. It is bound to double and be safe all the
time. We every stock sold gets more valuable when im-
proved by the management.

I'll guarantee $oo against loss, will
submit all my proofs(bills (all, no fee whatever
agree to refund $ & principal with 5% interest
yearly note.

I must have the acting p.m. Also Sheila
first option of it days on the stock if offered
for sale.

I will report progress from time to time.

With a Merry Christmas, I am

Yours very truly,

Mr. Kingsbury, Jr.,

had accepted not returned one that the notices on the farms
that Baylor is this time he sold but that for week it the join-
ed "fully paid and non-assessable." Plaintiff further
testified that on or about March 2, 1913, she received a
statement in writing from the defendant company, showing
$1400; that in July, 1913, defendant sold one share of her
stock to Chandler and directed same with a dividend;
Thereafter defendant company declared dividends and
company. These certificates were sent by the defendant and
plaintiff was for 8(shares in the Farms Co. Corp., which re-
ceived "fully paid and non-assessable." One certificate for
same shares and another certificate for one share in the Lumber
Woods Co. Corp. which certificates were endorsed and delivered
by him endorsed on the back to plaintiff. In their face they
were void and of no effect. Plaintiff further
testified that on or about March 2, 1913, she received a
statement in writing from the defendant company, showing
$1400; that in July, 1913, defendant sold one share of her
stock to Chandler and directed same with a dividend;
that Baylor at this time he said but that for week it the join-
had accepted not returned one that the notices on the farms

had been foreclosed; that she received a letter from defendant July 22, 1915, defendant living at that time in Chicago; that afterwards he came out of her home on Sheridan Road and said he wanted to start in a new business and wanted to know if plaintiff would lend him more money for that purpose; that "I said, 'you are already very deeply in debt and you should not ask me for any money'" and he replied, "'I intend to pay you the $3,000 with all interest, the $2,000 with all interest. If you will only give me some money to help me start this Guarantee Mortgage & Trust Company I can surely pay you in a year or two years at the furthest.'"; that she then said to defendant, "'What about the Colorado investment? What about the $2,000? What about the Altura investment of $3,000?'" He said, "'I intend to pay you both the note and the Altura, the $2,000 with all interest and the $3,000 with all interest if you will only help me start this Guarantee Mortgage & Trust Company.'" that she afterwards loaned him at different times $100, $200, $400 and $900, making a total of $1600, which he had since repaid. The defendant testified that prior to December 16, 1909, he did not write plaintiff a letter in which he stated that if plaintiff would invest $3,000 he would guarantee her against loss. Obviously there is no dispute that he did write and mail the letter of December 16 above quoted. He further testified that he had a conversation with plaintiff at the Morrison Hotel on the 20th or 25th of July, 1915, and that he did not then tell the plaintiff that he intended to repay her the $2,000 and interest, evidenced by the note, if she would make a further loan to him; that the only conversation had was "that she had been down to Denver and understood the bankruptcy petition was filed and the conversation was along that line. I could do nothing until the bankruptcy petition was out of the way. * * * I explained to her

Republican politics was out of the way. * * * I explained to her reluction was about that time. I doubt de neighbk until the war and numbered the Republican petition was filed and the committee only conservative and wealthy one that was down to Jefferson City, and for the initiative to repeal the 2¢/gal. gas tax', cal- ed 'Jan. 31st, 1918', and that he did not file the petition or sign it. ' conservation area boundary of the Weldon Level on the 36th December 10 mines down. In October insisted that he had a there is no chance that we old cattle boy until the latter of August $2,000. He is in Kewaunee but school at Iowa. Chatoway physically a loser in order to assert that it originally owned Covenant capitol that prior to December 10, 1860', he did not write $500', marked a total of $100', which the mud mines report. The de- ure Agreement leased him at different times $300', $500', $400 and only half an acre into Chairperson Rodriguez - Lamar Secondary.' that with all interest and the $7,000 with all interest if you will "I intend to buy him for both the more than the client', the $8,000 $2,000. When about the client investment of $2,000!" He said, declaration', "What about the Colorado Investment that about the Iowa or two Acres at the Carnegie.'"; that she then said to Charlotte Montagne & Lamar Company I was merely bet him in a It has still only him to some money to help me start this $2,000 with all interest. the $2,000 with all interest. "I intend to buy not ask me for any money." and he replied, "I intend to buy I said, 'Can you already Andi Canby in dept and Tom Young it highly would lend him more money for that purpose; that said he wanted to stay in a new business and wanted to know that already be done out of her home on Spending Road and that July 22, 1912, delegates Italy at that time in Ontario; ing been informed that the Attorney at the Second Judicial

that they (the attorneys) were still fighting (the petition) and I could not do anything until that was out of the way"; that that was all that was said on that subject; that nothing was said in reference to the $3,000 investment in the Altura stock and that at no time was anything said about any guarantee, and that nothing was said at the Morrison Hotel conversation about him paying her any money whatever; that after the filing of the petition in bankruptcy he did not tell plaintiff that he would pay her any money except the several sums aggregating $1600 which she loaned him. He further testified that he did not tell plaintiff the mortgage had been foreclosed on the Altura farms and that he knew of no mortgage being foreclosed on the farms; that he did not tell plaintiff that the dividends which he had sent her had not been paid by the company but were paid out of his own pocket. The defendant also offered in evidence copies of certain of the proceedings in his bankruptcy matter in California, the schedule of which shows plaintiff as one of defendant's creditors, evidenced by an unsecured note for $2500. The bankruptcy proceeding was instituted June 1, 1914, in the United States District Court, for the Northern District of California, and an order of that court showed that defendant had complied with all the requirements of the law in reference to bankruptcy and it was ordered that he be discharged from all of his provable debts which existed on June 1, 1914.

Complaint is made to the rulings of the court in the admission of evidence, that when plaintiff testified that she had received the letter requesting the investment of the $3,000 and guaranteeing its repayment in case the venture proved a failure, counsel for the defendant, before the contents of the

that they (the attorneys) were still fighting (the petition) and I cannot get to anything until that was out of the way"; that that was all that was said on their behalf; that nothing was said in reference to the $2,000 investment in the Miami speak and that at no time was anything mentioned by Mattson- ine, and that nothing was said at the Morrison Hotel concern- ing Mattson buying out any money Whatever; that after the filing of the petition in bankruptcy he did not tell Dimmitt that he would pay her any money except the regular mana subscription price and commissions; that further deponent saith not.

The deponent also offered in evidence copies of certain bills paid by the company but were not a part of its own budget. Upon being informed that the dividends which he had not received were being reinvested on the farms; that he did not tell Dimmitt that he did not pay Ferdinand or the Miami Union and that he knew of no complaints against the company but was not satisfied that he did not pay Dimmitt the notebook and $2,000 investment.

letter were disclosed, sought to find out by cross-examination whether plaintiff remembered its contents; that plaintiff had testified she had this letter together with about a dozen other letters in a pasteboard box in a trunk which had been burglarized; that defendant's counsel then asked, "Now, can you describe to the court and jury any other particular letter that was missing at that time?" to which objection was sustained; that he also asked plaintiff during this cross-examination if she had not testified at a former trial of the case that the letter which she claimed to have lost was placed in a certain candy box at or shortly after the time she received it and that it had not been taken out of the box since that time. Objection to the form of this question was sustained; that she also testified that she had read these letters, and counsel for defendant then asked, "Tell us what ones you did read." to which objection was sustained. It is argued from this that the court unduly limited the cross-examination of this witness on a vital point of the case. We have examined the record on this point and find that after counsel for plaintiff had brought out the fact that plaintiff had received such a letter from defendant, before going further with her examination, on the request of counsel for defendant he cross-examined her before she was permitted to state the contents of the letter. This, of course, was the proper procedure. We find upon such examination that on this phase of the case counsel was given great latitude by the trial judge and that he cross-examined plaintiff in great detail and that brought out on this cross-examination sufficient to entitle the plaintiff to thereafter state the contents of the letter. We think there was no substantial error in the ruling of the court.

cumstal error in the ruling of the court.

state the contents of the letter. We think there are no mis-examination sufficient to entitle the plaintiff to the verdict plaintiff in error relied and that brought it on this error- fient justice by the trial judge and that he cross-examined examination that on this phase of the case counsel was given time, of course, was the proper procedure. We find upon such her before she was permitted to state the contents of the letter. tion, on the request of counsel for defendant he cross-examined a letter from defendant, before being further wit. her examine- tiff had brought out the fact that plaintiff was received such ed the record on such point and time thereafter counsel for plain- of this witness on a vital point of the case. He have examin- from this that the court unduly limited the cross-examination did read." to which objection was sustained. It is argued and counsel for defendant then asked, "Tell me what else had pained; that she also testified that she had read those letters, that time. Objection to the form of this question was sus- gained it and that it had not been taken out of the box since in a certain candy box at or shortly after the time she re- case that the letter which she claimed to have just was placed examination if she had not testified at a former trial of the was emphasized; that he also asked plaintiff during this cross- letter that was missing at that time?" to which objection can you describe to the court and jury any other particular been sustained; that redirect's counsel then asked, "Now, a dozen other letters in a pasteboard box in a trunk which had till had testified she had this letter together with about tion whether plaintiff remembered the contents; that plain- letter were disclosed, sought to find out by cross-examine-

The court gave 3 instructions requested by the plaintiff, 13 requested by the defendant, and 2 submitted by the defendant were modified and then given to the jury. 9 instructions offered by the defendant were refused. Complaint is made to the three instructions given at plaintiff's request. By one of these the court instructed the jury that while the burden of proof was upon the plaintiff to prove her case by a preponderance of the evidence, still if the jury found that the evidence bearing on her case preponderated in her favor although but slightly, it would be sufficient for the jury to find the issues in her favor. It is argued that this instruction is wrong because it in effect told the jury that if they believed from a preponderance of the evidence that plaintiff proved her case by a preponderance of the evidence as stated in her declaration, it would entitle her to a verdict, thereby ignoring the defense of the Statute of Limitations and the discharge in bankruptcy and the reply of the plaintiff setting up the new promise, none of which appears from the declaration. The instruction given did not advise the jury that they should find for the plaintiff if she proved her case as alleged in her declaration, but it is to the effect that plaintiff was entitled to a verdict if the jury believed that she established her case by a preponderance of the evidence. Moreover the defendant offered an instruction which told the jury that as a matter of law it would not be necessary for them to consider the question of damages "unless and until you first determine that the plaintiff has established her case by a preponderance or greater weight of the evidence." This instruction then added that the amount of the damages should not be arrived at by the so-called "quotient" method. The court struck this latter out and gave the instruction as modified. If there was any error

The court gave 3 instructions requested by the plaintiff, 12 requested by the defendant, and 3 modified by the defendant were modified and then given to the jury. 8 instructions offered by the defendant were refused. Complaint is made to the three instructions given at plaintiff's request. By one of these the court instructed the jury that while the burden of proof was upon the plaintiff to prove her case by a preponderance of the evidence, still if the jury found that the evidence bearing on her case preponderated in her favor although her ailment, it would be sufficient for the jury to find the issues in her favor. It is argued that this instruction is wrong because it in effect told the jury that if they believed from a preponderance of the evidence that plaintiff in her complaint, it would entitle her to a verdict, thereby ignoring the defense of the statute of limitations and the dismissal by the court of the evidence as stated by one of the physicians. It may be true that they should not have given the instruction given but we do not think the error complained of was prejudicial. If it was only error to refuse the instruction as requested. The court stated that the amount of the damages who. d not be affected at by the character weight of the evidence." This instruction thereby the plaintiff was entitled but one by a preponderance or mention of damages "unless and until you first determine that a matter of law it would not be necessary for them to consider the defendant offered an instruction which told the jury that no but case by a preponderance of the evidence. However the fact is material if the jury believed that the sustained not decoloration. but it is to the effect that plaintiff was entitled for the plaintiff it was proved her case as alleged in The instruction given did not require the jury that they should disregard in pecuniary and the rugby of the plaintiff sustained ub the dog bronzed, none of which appears from its declaration. ignoring the defense of the statute of limitations and the in her complaint, it would entitle her to a verdict, thereby proved per case by a preponderance of the evidence as stated pleaded from a preponderance of the evidence that plaintiff tion is wrong because it in effect told the jury that if they find the issues in her favor. It is argued that this instruc- though her ailment, it would be sufficient for the jury to evidence bearing on her case preponderated in her favor although the preponderance of the evidence, still if the jury found that the burden of proof was upon the plaintiff to prove her case by a By one of these the court instructed the jury that while the is made to the three instructions given at plaintiff's request. 8 instructions offered by the defendant were refused. Complaint by the defendant were modified and then given to the jury. plaintiff, 12 requested by the defendant, and 3 modified

The court gave 3 instructions requested by the

in giving plaintiff's instruction complained of, the instruction submitted by the defendant was subject to the same objection and which the court gave as modified. We think the error, if any, would not warrant a reversal of the judgment, because it is clear upon a consideration of all of the instructions and the facts in evidence that the jury were clearly told that plaintiff could not recover unless she established the fact that defendant made a new promise to pay plaintiff after his discharge in bankruptcy, because the jury were told in a number of instructions that the defense of bankruptcy was a legal and proper defense to be made and that before a new promise would obviate this defense, such new promise must be made in clear and unequivocal terms and that the fact that defendant had gone through bankruptcy was uncontradicted, and the jury were then told that in these circumstances they should find the issues for the defendant "unless you believe from a preponderance or greater weight of the evidence that the defendant has made a clear unequivocal promise to pay the amounts for which she sues" since the filing of the petition in bankruptcy, and that if the jury believed from the evidence that the defendant's statement in reference to repaying the money was only a hope or expectation of defendant to pay, they should find for the defendant.

Complaint is also made to the giving of an instruction at the request of plaintiff which told the jury that as a matter of law the existence of a prior indebtedness was a sufficient consideration for a new promise to pay the sum due, and if they believed from the evidence that the defendant promised to pay the plaintiff after he was adjudicated a bankrupt whatever sums he owed her when he filed his petition in bankruptcy, then

in giving plaintiff's instruction complained of, the instruction submitted by the defendant was subject to the same objection and which the court gave as modified. We think the error, if any, would not warrant a reversal of the judgment, because it is clear upon a consideration of all of the instructions and the facts in evidence that the jury were clearly told that plaintiff could not recover unless she established the fact that defendant made a new promise to pay plaintiff after his discharge in bankruptcy, because the jury were told in a number of instructions that the defense of bankruptcy was a legal and proper defense to be made and that before a new promise would obviate this defense, such new promise must be made in clear and unequivocal terms and that the fact that defendant had gone through bankruptcy was uncontradicted, and the jury were then told that under these circumstances they should find the issues for the defendant "unless you believe from a preponderance or greater weight of the evidence that the defendant has made a clear unequivocal promise to pay the amounts for which she sues" since the filing of the petition in bankruptcy, and that if the jury believed from the evidence that the defendant's statement in reference to repaying the money was only a hope or expectation of defendant to pay, they should find for the defendant.

Complaint is also made as to the giving of an instruction at the request of plaintiff which told the jury that as a matter of law the existence of a prior indebtedness was a sufficient consideration for a new promise to pay the sum due, and if they believed from the evidence that the defendant promised to pay the plaintiff after he was adjudicated a bankrupt whatever sums he owed her when he filed his petition in bankruptcy, then

the jury might find the issues for the plaintiff and assess her damages at such sum as they might find is due her upon such indebtedness. One objection made is that it does not require the jury to first find that the defendant was indebted to plaintiff on the alleged guarantee for the $3,000; that this liability was disputed; that the instruction told the jury that all they need find from the evidence was that the defendant made a new promise but that it did not require them to first find the defendant liable for the $3,000. We think the instruction is not subject to the objection made. While it might easily be improved upon, it in effect told the jury that a prior indebtedness was a sufficient consideration to support the new promise to pay the plaintiff, and that if the jury believed from the evidence that the defendant, after he had been adjudged a bankrupt, promised to pay plaintiff whatever he owed her prior to the time he filed his petition in bankruptcy, then they might find the issues for the plaintiff and assess her damages at the amount of such prior indebtedness. From this it appears that before the jury could find the amount of plaintiff's damages they must find the amount of the old indebtedness which necessarily required them, before they could include the $3,000 in their verdict, to find that defendant had agreed to repay this amount to plaintiff in case the Colorado venture was a failure. We think the jury were not at all misled.

The court also told the jury that they were not bound to believe anything to be a fact simply "because a witness stated it to be so, provided you believe from the testimony that such witness has testified falsely as to such fact." It is contended that this instruction is wrong in that it used the word "testimony" instead of the word "evidence" and that in the

the jury might find the issues for the plaintiff and award per damages or much more as they might find is due upon each indebtedness. One objection made is that it does not require it to be so. Reasonable men believe it to be the testimony that such witness has told : Jointly as to such fact." It should be believe any thing it is to mean that "because a witness is contended that this instruction is going to show it was the word "testimony" instead of the word "evidence" and that to the jury that all they need find from the evidence was that the defendant was indebted to plaintiff on the aforesaid guaranty for the $2,000; that this liability was disputed; that the instruction told the jury to first find that the defendant was indebted in the amount as sued for; that the instruction is not made a bone of contention but that it did not require them to find the defendant liable for the $2,000. We think the instruction is not subject to the objection made . Quite it might possibly be contended that the use of the word "testimony" from the evidence that the witness, after he had obtained a promise to pay the plaintiff, and over if the jury believed a preponderance of the testimony to support the note in question, then the jury might find a verdict for plaintiff and against defendant. However to read but prior a paragraph, proceeds to pay plaintiff. Whatever be said in the time be filed his petition in bankruptcy, then they might find the issues for the plaintiff and against the defendant as the one of any. Quite important. From this it appears that before the jury could find the amount of plaintiff's damages they must find the amount of the indebtedness which is admitted to be due. Before the jury could find the amount of plaintiff's indebtedness they must find the amount of the indebtedness which necessarily required them. Before the jury could include the $2,000 in their verdict, it first had to find that a contract had existed to pay this amount to plaintiff in case the Colorado Furniture was a failure. We think the jury were not at all misled.

The court also told the jury that they were

instant case there was considerable documentary evidence, and the effect of the instruction was to tell the jury that they "may disregard the testimony of appellant on any fact if that testimony is contradicted by testimony of appellee" notwithstanding that the overwhelming weight of documentary evidence abundantly corroborated the defendant. We think this instruction did not mislead the jury at all.

Complaint is further made to the refusal of the court to give instructions which, for convenience, we number 3, 4,5, 6, 7 and 8. Instruction 3 was to the effect that where a guarantee depends upon the happening of a contingency as claimed by the plaintiff, she must prove by a preponderance of the evidence that she notified the guarantor within a reasonable time after the happening of such event in order that the defendant might protect himself if he could, and that even if the jury found from the evidence that the written guarantee was made by the defendant as plaintiff claims, they should find the issues for the defendant if they found from the evidence plaintiff failed to notify him of the happening of the contingency, upon which he would become liable on his guarantee, within a reasonable time after the happening of such contingent event. The instruction is not clear but ambiguous. It might be misleading and, therefore, was properly refused. This is not like a case where the guarantor must be notified by the payee of a note that demand for payment has been made and refused,- where the guarantor is to pay the debt of another. Moreover, in the instant case, the evidence shows that defendant was connected with the Colorado companies and would naturally know more about the affairs of those companies than the plaintiff. The instruction, we think was properly refused. Instruction

instant case there was considerable documentary evidence, and the effect of the instruction was to tell the jury that they "may disregard the testimony of opposition on any fact if that testimony is contradicted by testimony of apparently better standing that the overwhelming weight of documentary evidence should outweigh the defendant. We think this instruction did not misled the jury at all.

Complaint is further made to the refusal of the court to give instructions which, for convenience, we number 3, 4-B, 6, 7 and 8. Instruction 3 was to the effect that where a plaintiff depends upon the mortgaging of a continuously as claimed by the plaintiff, who must prove by a preponderance of the evidence what are notified the guarantor within a reasonable time after the happening of such event in order that the defendant might protect himself if he could, and that even if the jury found from the evidence that the defendant so notified, they should find the issues for the defendant if they found from the evidence plaintiff failed to notify him of the happening of the contingency, upon which he would become liable on his guarantee, within a reasonable time after the happening of such contingent event. The fact notice is not clear but doubtful. It might be misleading one, therefore, are properly refused. This is not like a case where a guarantor is to pay the debt of another. However, in the instant case, the evidence shows that defendant was continuously advised by the plaintiff. Instruction 4-B was properly refused for the reason that the jury at all.

4 sought to tell the jury as a matter of law that "if a promise to pay an action barred by the defendant's discharge in bankruptcy is made conditionally, the action is not revived unless and until the condition attending such promise, if any, has been fulfilled." It is argued that plaintiff's testimony as to the new promise made by defendant is but a mere expression of a hope or intent that the defendant will be able to pay his indebtedness to plaintiff and, therefore, this instruction should have been given. The instruction was in the nature of an abstract proposition which it is never error to refuse. Moreover, the jury were instructed, at the request of defendant, that before they could find for the plaintiff on the question of a new promise they must believe from the evidence that the promise was made in clear and unequivocal terms, and unless the jury believed from a preponderance of the evidence that the defendant had made such a clear and unequivocal promise to pay plaintiff they should find the issues for the defendant. The defendant certainly had all the benefit he was entitled to in these instructions. By defendant's refused instruction 5 it was sought to tell the jury that the burden of proof was upon the plaintiff to prove all of the issues except defendant's discharge in bankruptcy and the plea of the Statute of Limitations. It is argued that plaintiff brought into the case by replication a new and affirmative issue in which she set up the new promise to pay after the discharge in bankruptcy and the Statute of Limitations and, therefore, the jury should have been told that the burden was upon her to prove the new promise. They were told this in another instruction to which we have heretofore referred and this was sufficient. By refused instruction 6 the defendant sought to tell

4 sought to tell the jury as a matter of law that "if a promise to pay an action barred by the defendant's discharge in bankruptcy is made conditionally, the action is not revived unless and until the condition attending such promise, if any, has been fulfilled." It is argued that plaintiff's testimony as to the new promise made by defendant is but a mere expression of a hope or intent that the defendant will be able to pay his indebtedness to plaintiff and, therefore, this instruction should have been given. The instruction was in the nature of an abstract proposition which it is never error to refuse. Moreover, the jury were instructed, at the request of defendant, that before they could find for the plaintiff on the question of a new promise they must believe from the evidence that the promise was made in clear and unequivocal terms, and unless the jury believed from a preponderance of the evidence that the defendant had made such a clear and unequivocal promise to pay plaintiff they should find the issues for the defendant. The defendant certainly has all the benefit he was entitled to in these instructions. By defendant's refused instruction B it was sought to tell the jury that the burden of proof was upon the plaintiff to prove all of the issues except defendant's discharge in bankruptcy on the plea of the Statute of Limitations. It is argued that plaintiff brought into the case by replication a new and affirmative issue in which she set up the new promise to pay after the discharge in bankruptcy and the Statute of Limitations and, therefore, the jury should have been told that the burden was upon her to prove the new promise. They were told this in another instruction to which we have heretofore referred and this was sufficient. By refused instruction C the defendant sought to tell

the jury that unless they found from the evidence that plaintiff offered to return the stock to defendant upon his paying the $3,000 with interest thereon, they should find the issues for the defendant. Obviously this was incorrect because it did not effect the $2,000 evidenced by the promissory note. Moreover, the stock was shown to be worthless and of no value. The instruction was clearly wrong. By refused instruction 7 it was sought to tell the jury that if they believed that plaintiff and defendant were equally credible witnesses, they should find for the defendant upon the question of the new promise if the jury believed that the other evidence bearing upon that subject was evenly balanced. This instruction is misleading. Defendant's counsel say that it in effect "tells the jury that if there is no evidence on the subject of a new promise except that emanating from the mouths of the plaintiff and defendant, then, inasmuch as the plaintiff affirms there was a new promise on the one hand, and the defendant denies it on the other, and if the plaintiff and the defendant are equally credible witnesses, it necessarily follows that the plaintiff has not sustained the burden of proof on that issue." Manifestly this argument is unsound because the jury should consider all of the evidence in the case in deciding whether there was a new promise. Refused instruction 8 was as follows: "The court instructs the jury as a matter of law that the plaintiff cannot recover on the letter of December 16, 1909, in evidence in this case." Of course, that instruction was clearly wrong. It sought to single out a letter offered in evidence. Moreover, the jury were instructed at defendant's request that plaintiff could not recover on this letter as a guarantee unless the jury believed from the evidence that the defendant wrote to plaintiff the letter thatvwas lost or

stolen. There was no error in refusing the instruction. The defendant also offered an instruction to the effect that it would not be necessary for the jury to consider the question of damages until they had first determined defendant's liability by a preponderance or greater weight of the evidence, and if the jury did determine the question in favor of the plaintiff, they should not arrive at the amount of damages by what is called the "quotient" method. The latter part was stricken out, which is obviously correct. There is no reason why such a suggestion should be given to the jury at all, and they were told in other instructions how they were to arrive at the amount of damages in case they should find the issues for the plaintiff.

It is also argued that the evidence fails to show a new promise to pay plaintiff; that the most that can be said from the evidence is that it was an expression on behalf of the defendant of an intention or hope to pay the amount claimed. We think that the most that can be said is that this question was properly left to the jury and that they were clearly instructed on this point in three or four instructions at the request of the defendant.

Complaint is made that there is a difference in the names of the jurors signed to the verdict and as their names appear in the record. There is a slight difference in the spelling of the surname of one of the jurors and a few of them signed the verdict by their initials rather than by their given names. The point is trivial and is entirely without merit. Furthermore, the record recites that the jury empanelled found the issues, etc., without reciting their names.

reason" etc." against strictly direct means.

The second section that the jury considered going the route, the second question is certainly a very different matter. Whether the accused by their testimony met the burden of proof by clear and convincing evidence in the record. There is a slight difference in the application of the Jurors stated to the verdict and in their manner of testimony. Therefore it is necessary to examine the testimony of two witnesses.

Examining the case law, it is a difference in the testimony on this point in those or that instructions of the non-specific test to the jury and that such more clearly indicate the requirement of an impression or more to buy the amount claimed. We think that the test that can be said is that this question from the evidence is that it was an expression on behalf of a man dreaming to buy directly; that the test that can be said for the directly.

It is also stated that the evidence fails to show at the amount of damages in such that should find the issue that more sold in other instructions does such more to notice ably such a misconception should be given to the jury as all, and although the evidence is clearly overcome. There is to longer where is called the "emotional" nothing. The latter part was plaintiff, that should not notice of the amount of damages by itself only, and it the jury did determine the question in favor of the liability of a shopkeeper or former weight of the evidence, and if the jury did not first determined elements, or number until they did first determined elements, it would not be necessary for the jury to consider the damages. The elements also offered an instruction to the effect that such error. There was no error to refusing the instruction.

It is further argued that the verdict and judgment were excessive in that they include the amount plaintiff paid for the stock in the Suburban Farms Company as well as that in the Suburban Homes Company, while the testimony of plaintiff was to the effect that the guarantee only went to stock purchased in the farms company. We think this argument is also entirely without merit. Plaintiff testified that defendant was to return her the $3,000 and interest thereon in case the investment was a failure. It is clear that the witness did not differentiate between the two companies.

Another point complained of is that the court should have sustained a motion to direct a verdict because, as defendant's counsel say, the alleged new promise was made "prior to the adjudication" of defendant as a bankrupt, and it is argued that there is no proof made as to when the defendant was adjudged a bankrupt. This, of course, is an incorrect statement. Defendant himself offered evidence showing that he was adjudicated a bankrupt on June 1, 1914, and the new promise was made in August, 1915. We are unable to comprehend how such an argument can be advanced in the state of the record.

Upon a consideration of the whole record, we think defendant has had a fair trial. The issues were not involved but were simple, the only substantial dispute being as to whether defendant had guaranteed the repayment of the $3,000 in case the investment were a failure, and whether after defendant's discharge in bankruptcy he made a new promise of payment to plaintiff. There is always some technical error in any record, but we are clear that on a consideration of the entire record, the jury could not have reason-

It is further argued that the verdict was inadequate

ably rendered any other verdict, and this being true, of course, the judgment should not be reversed so that a better record might be made on another trial. People v. Halpin, 276 Ill. 363. We think that there is no substantial error but that the defendant has received every protection of the law to which he was entitled. The verdict is amply supported by the evidence.

We regret that before making an order of affirmance we must say something more. Counsel for defendant has not, in his brief, made a "short and clear statement of the case" as required by Rule 19 of this court, but the statement is involved and confusing. An instruction offered by defendant himself but which was refused by the court is quoted and he then adds that the instruction would have left the jury to speculate on the amount of plaintiff's damages. And in the argument following the brief the instructions are not discussed in the order in which they appear in the abstract of record. In fact, no order is followed and one of them is discussed at two different places. If Rule 19 of this court were followed, which requires the argument to follow the points made in the brief, and if the instructions are taken up in order, there being no reason why they should be treated otherwise, a great deal of labor would be avoided. What we have said applies with greater force to the so-called brief and argument filed by the plaintiff. What has been filed here on behalf of plaintiff is of no assistance whatever to this court. What is designated as an argument following the brief is no argument at all. It is a mere statement, for example, that "The rulings of the court upon the evidence were not prejudicial to the defendant", and again, "The instrum-

supported by the said case.

As regard that before making an order of affirmance we must say something more. Judgment for defendant has been made in this brief, made a part and clear statement of the case" of the law to which he can until ind. The verdict is amply error but that the defendant has received every protection Maleia, 249 Ill. 466. We think that this is no unfounded better record might be made on another trial. Loggia v. course, the judgment above will be reversed so that a

apply remarks any other vacation, and this being time, of

tions given for the plaintiff were not erroneous"; "The court did not err in refusing the instructions of defendant", without any argument or application to the case before us. We think this brief of plaintiff so far fails to comply with the rules of this court that it ought not to remain in the files. It is therefore stricken from the records of this court.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

tions given for the plaintiff were not erroneous; "The court did not err in refusing the instructions of defendant", although any argument or application to the case before us. We think this brief of plaintiff so far fails to comply with the rules of this court that it ought not to remain in the files. It is therefore stricken from the records of this court.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TERRELL AND RELYEA, for appellant.

No appearance.

74 - 26235

FRANCES KIRSCH,

Appellee,

v.

CITY OF HARVEY, a municipal corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

223 I.A. 639

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages for personal injuries. There was a verdict of $3800 in her favor. She entered a remittitur for $800 and judgment was entered on the verdict for $3,000, to reverse which the defendant prosecutes this appeal.

The record discloses that between 5:30 and 6:00 o'clock in the evening of June 4, 1910, plaintiff and her husband were walking south on the west sidewalk of Columbia avenue about 350 feet south of 147th street in the City of Harvey. It was a wooden sidewalk consisting of three stringers underneath and boards or planks nailed across them. Plaintiff's position is that the sidewalk was old, partially decayed, and some of the boards loose; that her husband stepped on one of these boards causing it to fly up in front of her against which she tripped, fell and was injured. The defendant's position is that the sidewalk was in fairly good condition and that the accident could not have happened in the manner that plaintiff said it did.

Plaintiff testified that on the afternoon in question she and her husband were walking on the sidewalk, he pushing a

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages for personal injuries. There was a verdict of $2800 in her favor. The entered a remittitur for $600 and judgment was entered on the verdict for $2,000, to reverse which the defendant prosecutes this appeal.

The record discloses that between 8:30 and 9:00 o'clock in the evening of June 4, 1910, plaintiff and her husband were walking south on the west sidewalk of Olympia Avenue about 200 feet south of 14th street in the City of Railway. It was a wooden sidewalk consisting of three stringers underneath and boards or planks nailed across them. Plaintiff's position in that the sidewalk was old, partially rotted, and some of the boards loose; that her husband stepped on one of them pereby causing it to fly up in front of her ankles which she tripped, fell and was injured. The defendant's position is that the sidewalk was in fairly good condition and that the accident could not have happened in the manner that Plaintiff said it did.

Plaintiff testified that on the afternoon in question she and her husband were walking on the sidewalk, he pushing a

baby carriage in which was their 27 month old baby; that the board flew up in front of her against which she stumbled and fell on her side; that "somehow my foot caught in the board and I fell on my left side. He stepped on it and the board flew up." Prior to the time of the trial plaintiff's husband died. The evidence further tends to show that the sidewalk was a wooden one and was laid about 17 years before the accident; that it was made of boards laid across three stringers; that it was rough in places and the boards loose and that it rattled when walked on. Witnesses for the plaintiff testified that it had been in bad condition for a long space of time prior to the day in question. The evidence further tends to show that immediately after the accident plaintiff felt sick; that she and her husband went to their home and that she was confined to her bed for six or seven days; that there were indications tending to show that there might be a miscarriage; that about ten days after the accident she went to see a physician who examined her and told her to go home and keep off her feet; that a day or so later there was a miscarriage and that plaintiff was laid up for a considerable time afterwards. The doctor testified that in his opinion the injury she received might have caused the miscarriage. The evidence also tends to show that she was a strong healthy woman before the accident, and that as a result of it she lost a great deal of weight and was unable to do her work for a long period of time. The defendant offered evidence tending to show that the sidewalk was in fairly good condition prior to the accident, but we think upon a careful reading of all the evidence inthe record, that the jury was warranted in finding that the sidewalk was in very bad condition and had been in such condition for a long time prior to the accident.

the accident.

dition and had been in much comfort for a long time prior to was murdered in Hindle that the sidewalk was in very poor accept leaving of or. The evidence ~ the record, that the jury it good consideration prior to the accident, and as think upon a different question to make that the sidewalk was in sufficient to do per rule for a long period of time. The determine a result of it was just a mere fact of safety and was made the cause of the accident," and that the cause the misconduct. The evidence also shows that fied that in his opinion the injury the received might have laid up for a considerable time a journeyman. The doctor testior so later there was a discoloration and that plaintiff was per and will bar to go home and soak off her feet; that a day after the accident she went to see a physician who examined when that there might be a misconstrue; that about ten days for six or seven days; that there were instructions handed to Maynard went in their home and that she confined to her bed jointly after the accident plaintiff fell sick; that she and her day in question. The attending doctor knows to show that immediately before in place and the wooden floor and that it testified it was tough in place and that plaintiff testified that it when walked on. Attempts for the plaintiff had been in bed condition for a long space of time prior to the

That evidence further tends to show that the sidewalk was a wooden one and was laid about 17 years before the accident; that it was made of pouring laid across three stringers; that Dwyer is the tiler of the first plaintiff's husband died. I fell on my left side. He stepped on it and the board flew off on her side; that "somehow my foot caught in the board and board flew up in front of her against which she stumbled and body carriage in which was their 27 month old baby; that the

The defendant first contends that the judgment should be reversed for the reason that the court admitted evidence, over its objection, as to the condition of the sidewalk for a considerable period of time before the accident, and it is argued that this was error because the allegations of the declaration were not broad enough to warrant the admission of such evidence. The declaration averred that the plaintiff was in the exercise of ordinary care for her own safety and that defendant carelessly and negligently suffered, permitted and allowed the sidewalk to be decayed and loose, "all of which the defendant knew or by the exercise of ordinary care could have known" and which the plaintiff did not know, etc. It is contended that this allegation was sufficient to admit proof of actual notice to the defendant of the condition of the sidewalk but that it was not broad enough to admit evidence tending to show implied knowledge on the part of defendant. No authority is cited in support of this contention, and, indeed, we think none can be found. It was alleged that the sidewalk was defective and dangerous and that the defendant by the exercise of reasonable care should have known of its defective condition. This was sufficient to admit proof showing that it had been in disrepair for some time prior to the accident, so as to bring knowledge to defendant. We think there is no merit in the point. Nor do we think that the point that the verdict and judgment are not sustained by the evidence is sound. It would serve no useful purpose to analyze the evidence in detail of the several witnesses further than we have already stated it, but we think it quite clear that whether the accident happened as plaintiff testified was clearly a question for the jury and we are in no position to say that the finding of the jury adopting plaintiff's version of the matter is

The defendant first contends that the judgment should be reversed for the reason that the court admitted evidence, over its objection, as to the condition of the sidewalk for a considerable period of time before the accident, and it is argued that this was error because the allegations of the declaration were not broad enough to warrant the admission of such evidence. The declaration averred that the plaintiff was in the exercise of ordinary care for her own safety and that defendant carelessly and negligently suffered, permitted and allowed the sidewalk to be decayed and loose, "all of which the defendant knew or by the exercise of ordinary care could have known" and which the plaintiff did not know, etc. It is contended that this allegation was sufficient to admit proof of notice to the defendant of the condition of the sidewalk but that it was not broad enough to admit evidence tending to show implied knowledge on the part of defendant. No authority is cited in support of this contention, and, indeed, we think none can be found. It was alleged that the sidewalk was defective and dangerous and that the defendant by the exercise of reasonable care should have known of its defective condition. This was sufficient to admit proof showing that it had been in disrepair for some time prior to the accident, so as to bring knowledge to defendant. To think there is no merit in the point. Nor do we think that the point that the verdict and judgment are not sustained by the evidence is sound. It would serve no useful purpose to analyze the evidence in detail of the several witnesses further than we have already stated it, but we think it quite clear that whether the accident happened as plaintiff testified was clearly a question for the jury and we are in no position to say that the finding of the jury adopting plaintiff's version of the matter is

against the manifest weight of the evidence. In these circumstances, of course, we cannot now disturb the judgment. Moreover, we think that there is nothing at all improbable in plaintiff's testimony as to how the accident occurred, but that on the contrary it seems entirely reasonable as the jury found.

A further point is made that it was the duty of plaintiff, after she received the injury, to use reasonable care to effect a speedy recovery by securing the services of a physician, but that she failed in this regard since she did not go to see a physician until ten days after she was injured. There is not a word of evidence in the record that this delay in any manner aggravated her condition or tended to bring about the miscarriage. Nor do we think that the judgment is at all excessive, because the evidence shows from the time of the accident until after the miscarriage plaintiff suffered severe pain and that she was in bed most of the time after the accident and prior to the miscarriage and for two or three weeks thereafter, and that she was unable to do her household work for nearly a year thereafter; that when she did work she became tired; that prior to the accident she weighed about 130 pounds and afterwards about 105 pounds. In these circumstances we think the damages are not excessive.

Complaint is also made that the court erred in permitting a witness for plaintiff, Mrs. Lawrence, to testify that shortly after the accident she helped take care of plaintiff and that plaintiff was sick at her stomach and had pains in her side. It is said that this was clearly inadmissible because the symptoms testified to were purely subjective and that a lay witness should not be permitted to testify on such matters.

but that on the contrary it seems entirely reasonable as the
jury found.

A further point is made that it was the duty of
plaintiff, after she received the injury, to use reasonable
care to effect a speedy recovery by securing the services
of a physician, but that she failed in this regard since she
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to bring about the miscarriage. Nor do we think that the
judgment is at all excessive, because the evidence shows from
the time of the accident until after the miscarriage plaintiff
suffered severe pain and that she was in bed most of the time
after the accident and prior to the miscarriage and for two
or three weeks thereafter, and that she was unable to do her
housework or work for nearly a year thereafter; that when she did
work she became tired; that prior to the accident she weighed
about 138 pounds and afterwards about 102 pounds. In these
circumstances we think the damages are not excessive.

Complaint is also made that the court erred in per-
mitting a witness for plaintiff, Mrs. Pearson, to testify that
shortly after the accident she noticed that plaintiff
and that plaintiff was sick at her stomach and had pains in her
side. It is said that this was clearly incompetent because
the chairman testified to more partly affirmative and that a jury
attorney should not be permitted to testify on such matters.

We cannot say that if plaintiff were "sick at her stomach" the symptoms would be subjective only, and while it might have been more proper to have the witness give her opinion as to the pain in her side, we think the jury was not at all misled for no one can testify as a positive fact that another person is suffering pain. The jury knew that she was merely giving her opinion. We think the slight error was not of such nature as would warrant our disturbing the judgment. On the contrary, upon an examination of the entire record we think the defendant has had a fair trial and was given all the benefits of the law that it was entitled to.

The accident happened in June, 1910. This case was instituted December 15, 1910. What has caused the delay is in no way explained. Counsel for defendant argue that the matter was deferred by the plaintiff but there is no evidence of this fact in the record. We think this case should have been brought to trial long ago and the fact that it has not been disposed of long before this can be laid at the door of both parties to the case.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ.,CONCUR.

We cannot say that if plaintiff were "sick at her stomach" she would be entitled to recover. But while it might have been more proper to have the witness give her opinion as the symptoms would be emphatic only. But while it might have been proper to strike out the answer, we think the jury was not at all misled for no one can tenably say as a positive fact that another person is suffering pain. The jury knew that she was merely giving her opinion. We think the slight error was not of such nature as would warrant us disturbing the judgment. On the contrary, upon an examination of the entire record we think the defendant has had a fair trial and was given all the benefits of the law since it was entitled to.

The accident happened in June, 1911. Suit was commenced in January, 1912. What has caused the delay is in no way explained. Counsel for defendant argue that the motion was delivered by the plaintiff but there is no evidence of this fact in the record. We think this case should have been brought to trial long ago and the fact that it was not is chargeable to the delay of plaintiff's counsel.

The judgment of the superior court of Cook County is affirmed.

JENKINS AND TAYLOR, JJ. CONCUR.

26309

143-26309

GEORGE M. MARKS,
Appellant,

-vs-

DR. J. MANNING ROBERTS,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

223 I.A. 639

On June 25, 1920, plaintiff brought an action of replevin claiming that he had a lien on defendant's automobile for labor and materials furnished in making repairs upon the automobile and that he was lawfully entitled to the possession of it. A writ of replevin issued and the return thereon shows that the car was duly replevied on June 28, 1920, by the bailiff of the Municipal Court of Chicago and delivered to plaintiff. At the hearing, before the conclusion of all of plaintiff's evidence, the court was of the opinion that plaintiff could not maintain his action for the reason that he had not complied with the provisions of the Garage Keeper's Lien act, secs. 3a, 3b, 3c and 3d, Ch. 82, R.S., (1919). The court then found that the right of possession of the automobile was not in plaintiff and awarded a writ of retorno habendo for the return of the property, to reverse which plaintiff prosecutes this appeal.

The record discloses that plaintiff was in the garage and automobile repair business and that defendant kept his car in plaintiff's garage; that prior to December, 1919, certain repairs were made on the automobile by plaintiff for which defendant failed to pay; that in December, 1919, plaintiff claimed a lien on the car for the work done and refused to permit defendant to remove it from the garage.

In March, 1930, defendant forcibly removed the car from plaintiff's garage. In June following the replevin suit was brought.

Plaintiff contends that the court was in error in finding against him for the reason that he was entitled to a lien under the provisions of the act above mentioned, and his argument is to the effect that he complied with all the requirements of that act. The defendant argues the contrary. This question we do not have to decide because we find upon our own examination that a few weeks after the briefs in this case were filed the Supreme Court of this State in the case of Jensen v. Wilcox Lumber Co., 338 Ill. 384, held the Garage Keeper's Lien act unconstitutional. (See also Taurber Art Galleries v. Riensi Garage, 337 Ill. 272.) It follows, therefore, that plaintiff was not entitled to any lien and the judgment of the Municipal Court was correct, and it is affirmed.

AFFIRMED.

THOMSON and TAYLOR, JJ. concur.

In March, 1923, defendant forcibly removed his car from plaintiff's garage. In June following the present suit was brought.

Plaintiff contends that the court was in error in finding against him for the reason that he was entitled to a lien under the provisions of the act above mentioned, and his argument is to the effect that he [illegible] under [illegible] the [illegible] of that act. The act [illegible] regards the contrary. This question [illegible] not [illegible] because we find upon our own examination that [illegible] in this case were filed the Supreme Court [illegible] in the case of Johnson v. Illinois [illegible] Co., [illegible] Ill. [illegible], held the Garage Keeper's Lien Act unconstitutional. (See also Thurlow Art Galleries v. [illegible], [illegible] Ill. [illegible].) It follows, therefore, that plaintiff was not entitled to any lien and the judgment of the Municipal Court was correct, and it is affirmed.

AFFIRMED.

THOMSON and TAYLOR, JJ., concur.

19 - 25906

IN RE ESTATE OF EMANUEL S. HEYMAN, Deceased, CORA HEYMAN, as executrix under the last will and testament of EMANUEL S. HEYMAN, Deceased,

Plaintiff in Error,

v.

LEON HARTMAN,

Defendant in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

223 I.A. 639

MR. JUSTICE TAYLOR delivered the opinion of the court.

A claim was filed by Leon Hartman in the Probate Court against the estate of Emanuel S. Heyman, Deceased, for the sum of $10,000.00 and interest at the rate of 6% per annum from September 3, 1909.

On July 17, 1915, the Probate Court allowed Leon Hartman's claim to the extent of $13,457.00 as of the Seventh Class. There was an appeal on the part of Cora Heyman, executrix of the estate of Emanuel S. Heyman, deceased, to the Circuit Court. There was a trial in the Circuit Court and judgment upon a directed verdict was entered in favor of the claimant, Leon Hartman, in the sum of $15,793.33. To reverse that judgment this writ of error is prosecuted.

The evidence shows that on September 3, 1909, Leon Hartman made a conditional purchase from John M. Ewen, N. S. Heyman and John M. Ewen Co. of 100 shares of the capital stock of the Wood Waste Products Company for $10,000.00 each.

14 AS AMENDED (7 AMENDED D.
REYNOLDS, Deceased,
DORA REYNOLDS, ex executrix under
the last will and testament of
MARSHALL V. REYNOLDS, deceased,

Plaintiff in Error, } Error to the

GLADDIS DUNN, }

v. }

LEWIS MARTHAN, }

Defendant in Error. }

Mr. Justice TAYLOR delivered the opinion of the court.

A claim was filed by Dunn against the estate of deceased R. Reynolds, deceased, for the sum of $12,000.00 was rendered at the rate of 6% per annum from September 5, 1906.

On a jury trial, the probate court allowed $12,000.00 to the extent of $12,000.00 as of the [illegible] date. There was an appeal on the part of the [illegible], to the District Court. [illegible] vested in the [illegible] joint and judgment upon [illegible] verdict was entered in favor of the plaintiff, Dunn, in the sum of $12,000.00. [illegible] to reverse that judgment, [illegible], in the sum of $12,000.00 to reverse that judgment [illegible] with error to process of [illegible] Dunn [illegible] Dunn, [illegible]. [illegible], R. C. Dayton and [illegible] W. R. Dunn [illegible] appeal of the plaintiff [illegible] Dunn [illegible] Dunn [illegible] Dunn

cash. The contract of purchase and sale was in writing and contained the following conditions:

> "At any time after one (1) year from date of purchase of this stock and within five (5) years from date of purchase of this stock, you are to have the privilege of returning to us said stock or such stock as you may receive of any other company which may purchase the rights and assets of said Wood Waste Co. and issue its stock in lieu of the above mentioned stock by giving thirty (30) days notice in writing to the undersigned or any one thereof, which said notice shall be addressed to the undersigned or someone thereof at the office of the John M. Ewen Company, in the Rookery Bldg., Chicago, Ill. and in the expiration of thirty (30) days from the date such written notice has been deposited in the mails addressed to the undersigned or someone thereof, as above provided, we, the undersigned, jointly and severally agree that we will pay to you in cash the said sum of $10,000, together with 6% interest thereon from the date of this contract to the time when such payment shall be made, less such sum or sums as you may have received by way of dividends or otherwise upon said stock or the stock which you may receive in lieu thereof during the time you may hold such stock.
>
> The intention and purpose of this conditional sale is to give you the right to return the stock conditionally purchased hereunder, or any and all stock which you may receive thereof, to us at any time after one year from the date of its purchase or within five years from the date of its purchase and upon your giving the notice above provided, at the expiration of thirty days required for such notice, we jointly and severally agree to pay to you in cash the said sum of $10,000, together with 6% interest thereon from the date of its purchase until the date of the said payment to be made by us to you, less any dividends or profits that you receive upon such stock while you hold the same, thereby insuring and protecting you against loss and giving you 6% upon your money in the event you see fit to return said stock within the time and in the manner above provided."

On September 21, 1910, a letter signed by all the sellers of the stock was sent to Leon Hartman, the purchaser, suggesting that he exchange the 100 shares of Wood Waste Products Company for stock of the Standard Alcohol Company, which latter company had proposed to give $400.00 per share for the stock of the Wood Waste Products Company providing certain conditions were fulfilled.

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and contained the following conditions:

"At any time after one (1) year from date of
purchase of this stock and within five (5) years
from date of purchase of this stock, you are to
have the privilege of returning in as sale stock
or such stock as you may receive of any other com-
pany which may purchase the rights and assets of
said Mead Farms Co. and I owe its stock in lieu of the
above named Co. and giving thirty (30) days no-
tice in writing to the undersigned or any one there-
of, which said notice must be addressed to the Mead-
claimed or because the cost of the farm
". Farm Company, in the Century Bldg., Omaha, Ne-
ceipt of thirty (30) days from the
date such notice shall have been deposited in the
mails addressed to the undersigned or successors
of, as above provided, the consideration, namely
and covenants agreed that we will pay, in cash
the said sum of $[illegible], together with interest there-
on from the date of this agreement to the time when such
payment shall be made, [illegible] per cent. per annum
more certain by me, [illegible] stockholder at Omaha upon said
of during the time you may hold said stock.

[illegible] interest [illegible]
it to give you the right to return the stock [illegible]
along or the right to [illegible] in lieu the-
reof, [illegible] time [illegible] at any time after one
year from the date [illegible] and within five years
from the date of this [illegible] stockholder at Omaha
mutually agreed upon [illegible] at any time after one
year from date [illegible] at any time after five years
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from date [illegible] at any time after sixty years
from date [illegible] at any time after sixty-one years
from date [illegible] at any time after sixty-two years
from date [illegible] at any time after sixty-three years
from date [illegible] at any time after sixty-four years
from date [illegible] at any time after sixty-five years
from date [illegible] at any time after sixty-six years
from date [illegible] at any time after sixty-seven years
from date [illegible] at any time after sixty-eight years
from date [illegible] at any time after sixty-nine years
from date [illegible] at any time after seventy years
from date [illegible] at any time after seventy-one years
from date [illegible] at any time after seventy-two years
from date [illegible] at any time after seventy-three years
from date [illegible] at any time after seventy-four years
from date [illegible] at any time after seventy-five years
from date [illegible] at any time after seventy-six years
from date [illegible] at any time after seventy-seven years
from date [illegible] at any time after seventy-eight years
from date [illegible] at any time after seventy-nine years
from date [illegible] at any time after eighty years
from date [illegible] at any time after eighty-one years
from date [illegible] at any time after eighty-two years
from date [illegible] at any time after eighty-three years
from date [illegible] at any time after eighty-four years
from date [illegible] at any time after eighty-five years
from date [illegible] at any time after eighty-six years
from date [illegible] at any time after eighty-seven years
from date [illegible] at any time after eighty-eight years
from date [illegible] at any time after eighty-nine years
from date [illegible] at any time after ninety years
from date [illegible] at any time after ninety-one years
from date [illegible] at any time after ninety-two years
from date [illegible] at any time after ninety-three years
from date [illegible] at any time after ninety-four years
from date [illegible] at any time after ninety-five years
from date [illegible] at any time after ninety-six years
from date [illegible] at any time after ninety-seven years
from date [illegible] at any time after ninety-eight years
from date [illegible] at any time after ninety-nine years
from date [illegible] at any time after one hundred years

On April 6, 1912, Leon Hartman wrote to John M. Ewen notifying him that pursuant to the agreement of September 3, 1909, he desired to turn over the stock and receive back the $10,000.00 in cash with interest at 6% per annum; and on the same date he sent a copy of that letter to E. S. Heyman. One Margaret Clancy, a stenographer, testified that she wrote the letter at the dictation of Leon Hartman and after it was signed by him mailed it. The witness Langworthy testified that in the Spring or early Summer of 1912 Leon Hartman in his office said to E. S. Heyman, "I have sent you that notice and I want you to take up these certificates in accordance with our agreement"; that Hartman then handed the certificates over to Heyman and said, "Here are the certificates"; that Heyman then said, "I am not prepared to pay that now. I wish you would reconsider the matter of the land out north"; that Hartman then said in substance, "I cannot use that land at that price."; that at that time the four certificates of stock were lying on Hartman's desk.

On April 29, 1912, E. S. Heyman wrote to Leon Hartman to the effect that he had had a conversation with Ewen and that the latter stated "that there would be absolutely no question as to their meeting your demand at the time and that independent of anything else the value of your stock and of all its other accumulations which would come along with the change would more than offset your claims and interest by a great deal." etc. In the same letter Heyman requested Hartman not to be anxious about the matter but to let it rest.

On June 25, 1912, Heyman again wrote to Leon Hartman stating that he had offered certain real estate because Hartman had asked him to relieve him of this stock, and said further. "which I would gladly do with cash if I had it available

On April 6, 1912, Leon Hartman wrote to John E. Keen notifying him that pursuant to the agreement of September 3, 1909, he desired to turn over the stock and receive back the $16,000.00 in cash with interest at 6% per annum; and on the same date he sent a copy of that letter to T. S. Heyman. One Margaret Clancy, a stenographer, testified that she wrote the letter at the dictation of Leon Hartman and after it was signed by him mailed it. The witness Longworthy testified that in the Spring or early Summer of 1912 Leon Hartman in his office said to T. S. Heyman, "I have sent you that notice and I want you to take up these certificates in accordance with our agreement"; that Hartman then handed the certificates over to Heyman and said, "Here are the certificates"; that Heyman then said, "I am not prepared to pay that now. I wish you would reconsider the matter of the land out north"; that Hartman then said in substance, "I cannot use that land at that price."; that at that time the four certificates of stock were lying on Hartman's desk.

On April 29, 1912, T. S. Heyman wrote to Leon Hartman to the effect that he had had a conversation with Keen and that the latter stated "that there would be absolutely no question as to their meeting your demand at the time and that independent of anything else the value of the stock and of all the other accumulations which would come along with the change would more than offset your claims and interest by a great deal." etc. In the same letter Heyman requested Hartman not to be anxious about the matter but to let it rest.

On June 25, 1912, Heyman again wrote to Leon Hartman stating that he had offered certain real estate to the Hartman and asked him to relieve him of the stock, and his for-

but I am willing to make this sacrifice rather than have you discontended, particularly as you bought this upon my recommendation." The letter then undertakes to offer certain real estate at $50.00 a front foot.

It is contended on behalf of Cora Heyman as executrix, of the estate of Emanuel S. Heyman, deceased, that for Hartman to be entitled to his claim against the estate he must prove that he physically tendered to the vendors under the contract of September 3, 1909, the shares of stock which under the terms of the contract the vendors agreed to repurchase. The conditional contract of purchase of September 3, 1909, provided that Hartman was "to have the privilege of returning to us said stock or such stock as you may receive of any other company * * * by giving thirty (30) days notice in writing * * * and at the expiration of thirty (30) days from the date such written notice has been deposited in the mails * * * we the undersigned jointly and severally agree that we will pay to you in cash the said sum of $10,000.00" etc. Even if no tender of the stock of the Standard Alcohol Company was made by him it would seem that Hartman properly notified Heyman on April 6, 1912, when he wrote to him stating that he desired to turn over the stock in question and receive the $10,000.00 cash with interest. On April 29, 1912, and on June 25,1912, when Heyman wrote Hartman that he had had a talk with Ewen and that the latter had stated that there would be no question as to Hartman's demand being met, and further wrote endeavoring to get Hartman to consider favorably the taking of certain real estate on the north shore in payment of the $10,000.00 and interest, no question was made as to any physical tender of the particular certificates of stock on the part of Hartman. Heyman recognized that Hartman had made a

but I am willing to make this sacrifice rather than have you discontinued, particularly as you bought this upon my recommendation." The letter then undertakes to sell certain real estate at $80.00 a front foot.

It is contended on behalf of Vera Berman as executrix, of the estate of Emanuel B. Berman, deceased, that for physical tender of the particular certificates of stock on the part of Berman. Berman recognized that Bertman had made a taking of a right real estate on the north shore to Lakeout at the $10,000.00 and interest, no question was made at to any note evidencing re-fact Berman to deposit immediately the be no question as to Berman's demand being met. and further talk with Mann and then the latter had stated that there was a June 15,1912. When Berman wrote demanding that he put up a $10,000.00 cash with interest. On April 30, 1913, was on demand to turn over the stock in question and receive the made it was thought that Berman personally notified Berman on April 4, 1913, when he wrote to his stating that he it no longer of the stock of it. Standard Electric Company was pay to him in cash the sum of $10,000.00" etc. When we the undersigned jointly and severally agree that we will sale such written notice has been deposited in the mails * * * ing * * * and at the expiration of thirty (30) days from the other covenant * * * by giving thirty (30) days notice in writing to us said stock or such portion thereof as you may tendive of any vided that Berman was "to have the privilege of returning conditional contract of purchase of September 3, 1909, pursuant to the terms of the contract the vendors agreed to reconvey. The time of September 3, 1909, the Bates of stock which under the provs that he physically tendered to the vendors under the contract Berman to be entitled to his claim against the estate he must strix, of the estate of Emanuel B. Berman, deceased, that for

It is contended on behalf of Vera Berman as executrix, of the estate of Emanuel B. Berman, deceased, that for physical tender of the particular certificates of stock on the part of Berman. Berman recognized that Bertman had made a taking of a right real estate on the north shore to Lakeout at the $10,000.00 and interest, no question was made at to any note evidencing re-fact Berman to deposit immediately the be no question as to Berman's demand being met. and further talk with Mann and then the latter had stated that there was a June 15,1912. When Berman wrote demanding that he put up a $10,000.00 cash with interest. On April 30, 1913, was on demand to turn over the stock in question and receive the made it was thought that Berman personally notified Berman on April 4, 1913, when he wrote to his stating that he it no longer of the stock of it. Standard Electric Company was pay to him in cash the sum of $10,000.00" etc. When we the undersigned jointly and severally agree that we will sale such written notice has been deposited in the mails * * * ing * * * and at the expiration of thirty (30) days from the other covenant * * * by giving thirty (30) days notice in writing to us said stock or such portion thereof as you may tendive of any vided that Berman was "to have the privilege of returning conditional contract of purchase of September 3, 1909, pursuant to the terms of the contract the vendors agreed to reconvey. The time of September 3, 1909, the Bates of stock which under the provs that he physically tendered to the vendors under the contract Berman to be entitled to his claim against the estate he must strix, of the estate of Emanuel B. Berman, deceased, that for

It is contended on behalf of Vera Berman as executrix, of the estate of Emanuel B. Berman, deceased, that for

-4-

but I am willing to make this sacrifice rather than have you discontinued, particularly as you bought this upon my recommendation." The letter then undertakes to sell certain real estate at $80.00 a front foot.

satisfactory demand for a cancellation of the sale and was entitled to be paid the $10,000.00 and interest.

Having in mind the construction which Heyman placed upon the contract we are of the opinion that Hartman was not required to make a physical tender of the stock. As the court said in Slack v. Knox, 190 Ill. 213, "It is permittible in construing a contract to look to the interpretation that the parties thereto have placed thereon in its performance for assistance in ascertaining its true meaning."

Further, the evidence sufficiently shows that a physical tender was actually made. Langworthy testified that Hartman told Heyman, "I have sent you that notice and I want you to take up these certificates in accordance with our agreement."; that Hartman handed the certificates over to Heyman and said, "here are the certificates."; that Heyman then said, "I am not prepared to pay that now. I wish you would reconsider the matter of that land out north."; that Hartman then said in substance, "I cannot use that land at that price." It is uncontradicted that the four certificates, being for a total of 340 shares of the Standard Alcohol Company, were on Hartman's desk and in the presence of Heyman at the time of the conversation. It is true that there is no evidence in the record as to the actual exchange by Hartman of the certificates of stock in the Wood Waste Products Company for certificates of stock in the Standard Alcohol Company, but it is only reasonable to infer from the testimony of Langworthy, and the letter of Heyman of April 29, 1912, that such an exchange was made, and further, that Hartman received 340 shares of Standard Alcohol Company stock for his interest in the Wood Waste Products Company. The instant case is not like that of Henderson v.

satisfactory reason for a cancellation of the sale and was entitled to be paid the $10,000.00 and interest.

Having in mind the construction which Hayman placed upon the contract we are of the opinion that Harmon was not required to make a physical tender of the stock. As the court said in Black v. Knox, 196 Ill. 210, "It is permissible in construing documents to look to the interpretation that the parties thereto have placed thereon in the performance for matters in ascertaining its true meaning."

Further, the evidence sufficiently shows that a physical tender was actually made. Competently testified that Harmon said Hayman, "I have come via that notice and I want you to take up those certificates in accordance with our agreement."; then Hayman handed the certificates over to Hayman and said, "Here are the certificates."; that Hayman then said, "I am not prepared to buy that now. I wish [illegible] consumated the matter of that land out north."; that Harmon then made it emphatic, "I cannot use them items at that price." It is uncontradicted that the four certificates, being for a total of 560 shares of the Standard Alcohol Company, were on [illegible] desk and in the presence of Hayman at the time of the conversation. It is true that there is no evidence in the record as to the actual exchange by Harmon of the certificates of stock in the Reed Estate Standard Company for certificates of stock in the Standard Alcohol Company, but it is only reasonable to infer from the testimony of Hayman, and the letter of Harmon of April 26, 1919, that such an exchange was made, and Harmon received 90 shares of Standard Alcohol Company. The instant case is not like that of Masterson v.

Wheaton, 139 Ill. 581, as in the latter case it was provided that if the purchaser "elects to return said 50 shares" etc., whereas in the present case Hartman had the privilege of returning the stock by giving thirty days notice in writing, and, having given thirty days notice in writing, there w s an undertaking by the vendors that they would pay the $10,000.00 and interest. When we consider the condition of the purchase as expressed in the contract, and the thirty days notice given by Hartman, and the letters written by Heyman, together with the testimony of Langworthy, which stands uncontradicted, we feel bound to conclude that nothing further remained to be done as a condition precedent, on the part of Hartman to entitled him to the return of the money with interest.

It is further contended that the trial judge erred in refusing to permit counsel for the executrix of Heyman's estate to interrogate the attorney for Hartman as to statements said to have been made by the attorney - in the course of former trials involving this matter - to the effect that no tender of the stock was made by Hartman.

On cross examination of Langworthy he testified that he had told the attorney for Hartman the substance of the conversation between Heyman and Hartman at the time of the trial of this cause before Judge Horner in the Probate Court. In 1915 the matter before Judge Horner was appealed to the Circuit Court and was partially tried before Judge Barrett in 1918. Subsequently in January, 1919, the cause was again tried before Judge McGeorty, and finally disposed of before Judge McGeorty in April, 1919.

Counsel for Cora Heyman, executrix, contend that, inasmuch as the evidence of Langworthy, as to the tender, was

Spencer, 129 Ill. 281, as in the latter case it was provided that if the purchaser refuse to return said of Amherst etc., the mean
in the present case Morrison had the privilege of returning the
stock by giving thirty days notice in writing, and, having given
thirty days notice in writing, there was no understanding by the
parties that they would pay the $11,500.00 and interest. When
we consider the condition of the stockers as expressed in the con-
tract, and the thirty days notice given by Morrison, and the letters
written by Payson, together with the testimony of Dunsworthy,
which stands uncontradicted, we feel bound to conclude that Morri-
ing Turner consisted to be more or a nominal pleasant, or
the part of Morrison to exhibit his to the tenure of the money
with interest.

It is further contended that the trial judge erred in
refusing to permit counsel for the executrix of Morrison's estate
to introduce the attorney for Morrison at the settlement said to
have been made by the attorney - in the course of former trials
to impeach the attorney for Morrison at the settlement said to
be inadmissible for the reason that the witness is
stock was made by Morrison.

(A more examination of the abstract of testimony that
we had this attorney for a time the witness of the con-
versation between Morrison at the time of the trial
of this cause before Judge Morris it is not stated. "
1919 the matter before this Morrison was accepted in the in-
tyred before Judge Baldwin, the family divorced at before
1919. Subsequently in January, 1919, the cause was again
call docket and was partially tried when before Judge Burkett in
the Morrison relative to return said of Amherst etc., the mean
Spencer, 129 Ill. 281, as in the latter case it was provided that

not produced until shortly before the trial before Judge Mc Coorty, it is subject to suspicion, and that they should have been allowed to put certain questions to the witness, Edward G. Felsenthal, who conducted the trials before Judge Horner and Judge McCoorty. Counsel for Cora Heyman, executrix, called Edward G. Felsenthal as a witness and after interrogating him as to his participation in the trial of the claim before Judge Horner, and the witness stating that he did not put Langwerthy on the stand nor examine him, asked the witness whether at the conclusion of the evidence before Judge Horner, the latter asked the following question: "Is there any evidence except the letter of the tender; is there any evidence of any offer to return the stock? and did you reply to that question as follows; Except in the letter of notice and in the claim itself." Also, after the witness had stated that he conducted the trial of the case before Judge McCoorty, the question was propounded; "Upon said trial did you state in open court that the evidence which would be produced at the trial before Judge McCoorty would be substantially the same evidence which was produced before Judge Horner in the hearing before the Probate Court?" Also, "Did you further state, in your opening statement to the court, that there was no physical tender of the certificates of stock but that said tender was unnecessary as would appear from an examination of the contract itself and the notice served in accordance with the contract?" To all those questions objections were sustained by the court. We are of the opinion that the rulings of the trial judge in sustaining objections to the questions propounded was not such error as to justify a reversal. That Mr. Felsenthal at a previous trial stated that he had no other evidence of tender than that contained in the offer to return the stock; and that in his opening statement

not produced until shortly before the trial before Judge Mc
Gourt, it is unplaced to conjecture, and that they should
have been allowed to put certain questions to the witnesses
Edward G. Valsenthal, who conducted the trials before Judge
Horner and Judge McCourt. Counsel for Dora Heyman, executrix,
called Edward G. Valsenthal as a witness and after interro-
gating him as to his participation in the trial of the claim
before Judge Horner, and the witness stating that he did not
but temporarily on the stand not examine him, asked the wit-
ness whether at the conclusion of the evidence before Judge
Horner, the latter asked the following questions: "Is there
any evidence except the letter of the testator; is there any
evidence of any effort to return the money? And did you reply
in that question as follows; Except in the letter of notice
and in the claim itself." Also, after the witness had stated
that he conducted the trial of the case before Judge McCourt,
the question was propounded; "Then said trial did not state
anywhere, in your opening statement to the court, that there
was no physical tender of the certificates of stock but that
said tender was unnecessary as being subject like an execute-
tion of the contract itself and the notice served in accord-
ance with the contract." To all those questions objections
were sustained by the court. To one of the curious that the
rulings of the trial judge in sustaining objections to the
questions propounded was not enough error as to justify a re-
versal. That Mr. Valsenthal at a previous trial stated that
he had no other evidence of tender than that contained in the

stated that there was no physical tender of the certificates of stock; that such tender was unnecessary; that at the first trial before Judge McGoorty he stated that the evidence which would be produced would be substantially the same evidence as had been produced before Judge Horner, would, all taken together, be of little if any importance in the instant case.

In the view we take of the evidence and the law applicable thereto the proffered evidence which it is contended by counsel for Cora Heyman, the executrix, should have been admitted, would be entirely immaterial and irrelevant.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

stated that there was no statutory power by the certificates

[illegible] no error I the record the judgment is

affirmed.

VANCISE J.

O'CONNOR, J.T. AND TIMLIN, J. CONCUR.

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JAMES TYLER,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

222 I.A. 634

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 30, 1919, the defendant, James Tyler, was indicted charged with burglary from a railroad freight car alleged to be owned and operated by the Baltimore & Ohio Railroad Company, and for larceny and receiving stolen property from the company. Being called for trial, the felony was waived as to each count and the defendant pleaded not guilty of petty larceny. By agreement the cause was submitted to the trial judge without a jury.

The evidence shows substantially the following:- Some time on July 18, 1919, a car load of automobile tires was shipped in a Santa Fe car No. 35968 from Akron, Ohio, to some point in the West. The car passed through the City of Chicago and part of Cook County and was for a time under the control and charge of the Baltimore & Ohio Railroad Company somewhere in the vicinity of 79th street and Western avenue. The car in which the tires were shipped was opened and a number of tires thrown out. Two of the tires were exhibited in court and offered in evidence.

IMPORT OF THE STATE OF ILLINOIS.

Plaintiff in Error.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 30, 1919, the defendant, James Tyler, was indicted upon a charge of burglary from a railroad freight car alleged to be owned and operated by the Baltimore & Ohio Railroad Company, and for larceny and receiving stolen property belonging to the company. Acting solely for itself, the railroad company was waived as to such count and the defendant pleaded not guilty of petty larceny. By agreement the cause was submitted to the trial judge without a jury.

The evidence shows substantially the following:-

Some time on July 12, 1919, a car load of merchandise liquor was shipped in a sealed car No. 38883 from Akron, Ohio, to some point in the east. The car passed into the city of Chicago and part of that journey was for a time on the Chicago and Western Indiana Railroad Company's tracks. The car was found in the yards of the railroad company in Chicago on July 15, 1919, and was then found to have been broken into and the contents thereof in part removed. The car in which the liquor was shipped and a number of cases thrown out. Two of the cases were opened and a number of glass bottles taken out. The car was then sealed and delivered to defendant in error.

Early in the morning of July 23, 1919, two men, Gundersen and Foley, together with the defendant, Tyler, were arrested near 79th and Western avenue. At the time they had a touring car which was stationed about 25 feet off the road and a truck which they had stationed along side of a neighboring ditch. Nieman, an officer of the Baltimore & Ohio, with some others, then arrested Gundersen, Foley and Tyler. About 75 tires were found by the officers. They were scattered in an area 200 yards away from the truck and touring car in a field alongside of the railroad track. At the time of the arrest, Foley and Tyler were with the truck. Nieman, the officer, had some talk with Foley and Tyler and as they went back to the truck, Gundersen started to run through the field. The officer then arrested them.

Neiman testified that the truck and touring car were by the railroad, about 200 yards away from where the men were; that the nearest of the tires was not quite 200 yards inside the field; that there was a bunch of them from 15 to 25 in a pile; that there were no tires in the truck or touring car.

One Vine, the passenger agent for the Baltimore & Ohio Railroad, testified that he saw a large automobile truck standing beside the road without any lights and a touring car down in the field behind some willows, and that in going down there they found Taylor and Foley who said they were waiting for two men who had gone to a garage to get gasoline for the touring car, but that upon examining the oil tank in the touring car they found it contained five gallon of gasoline.

On cross examination he testified that the tires that were scattered along the railroad were about 200 yards away

early in the morning of July 23, 1919, two men, Gunnerson and Coley, together with the defendant, Tyler, were arrested near 79th and Western avenue. At the time they had a touring car which was stationed about 30 feet off the road and a truck which they had backed along side of a neighboring ditch. Nielsen, an officer of the Baltimore & Ohio railroad, testified that he saw a large automobile truck containing one car, leave it considerable distance from the first truck and tour-

On close examination he testified that the first truck was deserted when the railroad men got up. Coley, Gunnerson and Tyler were arrested by the officers. They were carried in an area 300 yards away from the truck and tour- ing car in a field alongside of the railroad track. At the time of the arrest, Coley and Tyler were with the truck. Nielsen, the driver, Don Ware left with Tyler and Gunnerson in the touring car, which started to run through the field. The officer then arrested them.

Nielsen testified that the truck and touring car were by the railroad, about 30 yards away from where the men left; that the nearest of the tires was not quite 30 yards away; that the ground at the tires was not quite so soft as to bury the tires; that there were no ruts in the truck or touring car.

(The Vine, the car number plant for the Baltimore & Ohio railroad, testified that he saw a large automobile truck containing one car, leave it considerable distance from the first truck and tour- ing car in the field behind some trees, and start in riding down the track where they found Tyler and Coley who were busy at work getting

from where the truck and touring car were; that they found the tires on the morning of July 23 about 8:00 A.M., although Foley, Gundersen and Tyler were arrested at 3:00 o'clock that morning, before they found any tires in the prairie. The three men were taken to the detective bureau, and the Chicago police notified where the tires were found.

A watchman, Flesher, testified that on the morning of July 23rd, in the neighborhood of 75th and Western avenue, about 2:30 in the morning he saw a lot of tires lying near the track and also saw tires falling or rolling out of the door of a freight car; that the train was moving, and he reported the situation to a railway detective; that the tires were coming out of the second car from the engine. On cross-examination, he testified that in his judgment the tires did not fall out but were thrown out by some person in the train; that it was dark and he could not see ahead and that he did not see anybody throw them out.

Foley, called by the defendant, testified that Gunderson and Tyler went with him the night before; that they went out to get some beer; that when they got out in the neighborhood of 75th street he noticed the smell of leather burning in the clutch of the machine; that he stopped the machine and got underneath to tighten the spring; that he had been working about three quarters of an hour when five men came up with rifles; that the reason the automobile was off the street was because they moved it there so it would not be in anybody's way and to get it out of the dirt onto the grass.

Gundersen, called by the defendant, testified that he drove the truck and that they went out to get some bottled

from where the truck and touring car were; that they found the tires on the morning of July 23 about 8:00 A.M., although Foley, Gunderson and Tyler were arrested at 5:00 o'clock that morning, before they found any tires in the prairie. The three men were taken to the detective bureau, and the Chicago police notified where the tires were found.

A watchman, Fischer, testified that on the morning of July 23rd, in the neighborhood of 75th and Western avenue, about 5:30 in the morning he saw a lot of tires lying near the track and also saw tires falling or rolling out of the door of a freight car; that the train was moving, and he reported the situation to a railway detective; that the tires were coming out of the second car from the engine. On cross-examination, he testified that in his judgment the tires did not fall out but were thrown out by some person in the train; that it was dark and he could not see anyone [illegible] that he did not see anybody throw them out.

Foley, called by the defendants, testified that Gunderson and Tyler were with him the night before; that they went out to get some beer; that about the time they got out in the neighborhood of 75th street he noticed the smell of leather burning in the clutch of the machine; that he stopped the machine and got underneath to tighten the spring; that he was there working about three quarters of an hour when five men came up [illegible]; that the reason the automobile was off the street was because they moved it there so it would not be in anybody's way and to get it out of the dirt onto the grass.

Gunderson, called by the defendants, testified that he drove the truck and that they went out [illegible]

beer; that the truck belonged to the advertising company but that he knew the boss he was working for would not say anything; that he was told it would take about half to two hours to go out and come back; that Foley had a Buick; that when they got to Western avenue something happened to the Buick car and they stopped and as it was muddy they pushed it off into the grass and that afterwards the officers came along and arrested them; that he knew nothing about any tires being in that neighborhood.

It is quite obvious from a careful examination of the evidence that it does not prove beyond a reasonable doubt that the defendant was guilty of the crime of larceny. When the defendant was arrested the officers did not know that there were tires in the neighborhood that had been thrown out of one of the freight cars along side of the railroad. They were not discovered until five hours later, and no tires were found in the truck or automobile, so that there is no evidence of any physical connection between the defendant and the stolen property, no evidence that the crime of larceny was consummated. The circumstances in which the defendant was found may have seemed suspicious and may have seemed at the time sufficient to justify his arrest, but with the record as it is, and no actual connection of any kind between the defendant and the tires being shown, it is impossible to conclude that the evidence established beyond a reasonable doubt that the defendant was guilty of larceny. He was not charged with an attempt to commit larceny. If he had been, and upon the trial had been found guilty, we might not have been justified in holding that the proof was insufficient.

the piece was identified.

guilty, we might not have been justified in holding that Iarocuj. If he did [illegible], and then the trial had found Iarocuj. He was not charged with [illegible] to commit [illegible] a reasonable doubt that he was guilty of [illegible] the [illegible] and [illegible] kind between the defendant and the crime scene shown. It seemed at the time sufficient to identify it merely, but with the issue as it is, one is [illegible] description of any defendant was found who could eyewitness and may have of Jarocuj was examined. The circumstances in which the [illegible] was [illegible] to identify, we believe that the crime there is no evidence of any significant connection between the and no clues were found in the trunk or suitcase, so that [illegible] were discovered until five hours later, [illegible] out at one of the freight cars along edge of the railroad. They were not [illegible] that had been that there were [illegible] in the neighborhood when the defendant was arrested the officers did not know doubt that the defendant was guilty of the crime of Jarocuj. the evidence that it does not prove beyond a reasonable

It is quite obvious from a careful examination of

[illegible]; that he knew nothing about any crime being committed and no it was made they [illegible] it all into the trash [illegible] to Wanders assume something unknown to the Police car and to [illegible] and came back; that Foley had a [illegible]; that when they [illegible]; that he was told it would take about half to two hours that he knew the [illegible] was working for would not pay anyone; that the truck belonged to the advertising company but

A number of other contentions are made on behalf of the defendant but in the view we take of the case it is unnecessary to set them forth and discuss them.

The judgment, therefore, will be reversed.

REVERSED.

O'CONNOR, P.J. and THOMSON, J. CONCUR.

A number of other considerations are made on behalf of the defendant but in the view we take of the case it is unnecessary to set them forth and discuss them.

The judgment therefore will be reversed.

REVERSED.

O'CONNOR, P.J. and TRAINOR, J. concur.

54 - 26174

STANISLAW SZAFRANSKI,
Plaintiff in Error,
v.
WANDA WYSOCKI, et al.,
Defendants in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

223 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 4, 1910, the complainant, Stanislaw Szafranski, filed a bill of complaint in the Superior Court claiming the following; that in June, 1907, one Wysocki borrowed $1,000 from him and promised to give him a mortgage on a certain Lot 2, (191 W. Erie Street, old number) in Chicago, and to allow him in lieu of interest, to live rent free on the premises until the $1,000.00 was repaid; that Wysocki produced a written document; telling the complainant it was a mortgage, and persuaded him to sign and execute it; that he could not read or write English and relied upon the representations of Wysocki; that he, the complainant, took possession of the document, and went into possession of a three room flat on the premises; that subsequently, in August, 1909, while in possession of the flat, he was informed that Wysocki was negotiating with one Alfano and his wife for the sale of the property; that he then applied to Wysocki for the payment of the debt; that upon Wysocki's failure to pay, he consulted a lawyer and then learned for the first time that the document he signed in June, 1907, was not a mortgage, but was a contract for the sale of

DI/RIEKAW ESTAPHANKI,

Plaintiff in Error,

v.

ZARDA SYECZKI, et al,

Def endants in Error.

Mr. JUSTICE [illegible] delivered the opinion of the court.

On October 6, 1910, the [illegible] Company, [illegible] certificate, filed a bill of complaint in the [illegible] Court alleging the following: that in June, 1907, one [illegible] purchased [illegible] from [illegible] and [illegible] on a certain lot [illegible] (101 to 3rd Street, old number) in [illegible], and to allow the [illegible] of interest, to five [illegible] on the [illegible] until [illegible]; that [illegible] the [illegible] executed [illegible] to [illegible] and [illegible] the [illegible] expected [illegible] to [illegible] and [illegible] the [illegible] pleasant, [illegible] of the [illegible], the [illegible] consequence of a [illegible] [illegible] [illegible]

the property by Wysocki to the complainant for $7500.00; that then to protect his interest, on August 26, 1909, he had the document filed for record; that on August 25, 1909, Wysocki and his wife made a written agreement to sell the property to the Alfanos for $7300.00; that on August 30, 1909, Wysocki committed suicide, and subsequently the public administrator was put in charge of his estate; that on December 8, 1909, Wanda Wysocki, (widow of the deceased) and his heirs filed a bill for partition of the premises, in the Circuit Court, to which he, the complainant was made a party; that Wanda Wysocki, was appointed receiver to take charge of the premises in quertion; that he was ordered to show cause why he should not pay rent; that evidence was heard, and the rule to show cause discharged; that subsequently the partition suit was dismissed; that on September 28, 1910, Wanda Wysocki and the heirs of the deceased began a suit of forcible entry and detainer against him and he was compelled to surrender possession. The bill prays that he may be decreed to have a lien, on the premises, in the sum of $1,000.00 as of June 17, 1907, the date of the last payment of part of the original loan of $1,000.00, and that he may have interest thereon since the date of his eviction and that in case of a default the property be sold to satisfy his claim, etc.

On October 31, 1917, the defendants filed a demurrer. That was overruled, and on December 19, 1917, they answered, and to the latter a replication was filed. The matter was tried before the Chancellor, without a reference to a Master. No brief has been filed here on behalf of the defendants.

the property by Ayscough to the complainant for £7500.00;

that then to protect his interest, on August 30, 1909, he had the document filed for record; that on August 28, 1909, Ayscough and his wife made a written agreement to sell the property to the Allenon for $7500.00; that on August 30, 1909, Ayscough committed suicide, and subsequently the public administrator was put in charge of his estate; that on December 8, 1909, Hanna Ayscough, widow of the deceased) and his heirs filed a bill for partition of the premises. In the Circuit Court, to which he, the complainant was made a party; that Hanna Ayscough, her appointed receiver to take charge of the premises in question; that he was ordered to show cause why he should not pay rent; that evidence was heard, and the rule to show cause discharged; that subsequently the partition suit was dismissed; that on September 28, 1910, Hanna Ayscough and the heirs of the deceased in the sum of $1,000.00 on or June 17, 1904, the date of the last payment of part of the original loan of $1,000.00, and that he may be deprived to have a lien, on the premises, and he was compelling to surrender possession. The bill ought a suit of foreign entry and further relief him and he may be entitled to enforce the property be sold to satisfy his claim, etc.

On October 31, 1917, the defendants filed a demurrer. That was overruled, and on December 19, 1917, they answered, and to the latter a replication was filed. The matter was tried before the Chancellor, without a reference to a master. No proof has been filed but on behalf of the defendants.

At the trial eight witnesses were called and testified, five for the complainant and three for the defendant. The complainant was ineligible to testify as to what transferred between him and Wysocki, owing to the death of the latter.

After a careful analysis of the evidence we are of the opinion that the complainant should have been decreed the relief he prayed for.

The evidence of the witness Korgan establishes all the material facts. He says that Szafranski lived at a place of his, and that he told him Wysocki, who boarded with him, Korgan had some cash; that he introduced Szafranski to Wysocki at his, Korgan's house; that they had three conversations, the last of which was on June 7, 1907, at his house; that there were four present; that the conversation was that Wysocki said to Szafranski, "If you will let me take the money I will give you six per cent interest and a mortgage"; that Wysocki said, "In case you get married, I will give you some rooms which will be equivalent to the interest you are getting; and if not, then I will pay you the interest"; that he was in the building business and was always in need of money. Further, he testified that the money, $700.00 of it, was paid in his presence, in his bedroom, to Wysocki; that the complainant after that lived at his, Korgan's place about a month, and then having meanwhile been married, moved into Wysocki's property, occupying three rooms in the rear; that Wysocki paid him, Korgan, about twenty-five or thirty dollars for helping him get the loan.

The evidence of Korgan is quite fully corroborated by the

The evidence of Morgan is fairly corroborated
twenty-five or thirty dollars for buying him out the town.
Leonie in the room; that Gracchi beat him. Morgan, three
hours earlier, heard that Gracchi's ex-wife, mentioning three
hundred dollars, had left Morgan's house a month, and then
Gracchi; that the complainant often lent him money, to
the amount of $250.00 or it, was paid to his treasurer, in his presence, to
in need of money. Further, he testified that I the money,
was"; that he was in the habit of bringing business and was always
ten are better; and if not, then I will buy you the inter-
You came round again will be equivalent to the interest
that Gracchi said, 'In case you get married, I will give
money I will give you six per cent interest and a mortgage';
Gracchi said to Santarelli, "If you will let me take the
there were four present; that the arrangement was that
the last of which was on June 7, 1907, at his house; that
at his, Morgan's house; that they had three conversations,
Morgan had some cash; that he introduced Santarelli to Gracchi
at his, and that he said him Gracchi, who shouted at him,
the material facts. He says that Santarelli lived at a place

The evidence of the witness Morgan establishes all

the relief be asked for.

After a careful analysis of the evidence we are
of the opinion that the complainant should have been decreed

Justice.

latter between him and Gracchi, owing to the death of the
The complainant was entitled to testify as to what transpired, five for the complainant and three for the defendant.

At the trial eight witnesses were called and testi-

by the witness John Prus. He says he was present at the meeting when the complainant paid Wysocki the first payment, $700.00; that it was at Korgan's place; that Wysocki said he wanted to borrow some money; that it was April or June, 1907, that he first asked Korgan; that he then spoke to the complainant and told him he had to get some money to build a building; that the complainant told him he had only $700.00 and that was at home; that at the next meeting the complainant let him have the $700.00; that four days later Wysocki asked the complainant for some more money; that the paper was brought over the Sunday afterwards; that it was a long paper, and he, himself, could not read English; that the contract of sale produced at the trial looked like it; that Szafranski laid it on a table and said to the complainant, "Szafranski, this is good, and it is a receipt; it is as good as your money"; that about three weeks later the complainant gave Wysocki $300.00 more. A receipt was offered in evidence. "June 17, 1907. Received of S. Szafranski, $300.00 and property 191 W. Erie Street. (signed) S. Wysocki." On cross examination he stated that the contract of sale which wasproduced at the trial was the paper Wysocki presented to the complainant, and on re-direct, that at the time Wysocki asked the complainant for a loan, he said he would give him a mortgage on his house, meaning the house complainant afterwards went to live in.

The only countervailing evidence is that of two witnesses, Zukowski and Pazin. They testified to a transaction at Wysocki's office. Zukowski says it occurred in August, 1909, and Pazin says it was in 1909, but she does not remember the date. Zukowski testified that on that

of the witness John Zane. He says he was present at the
meeting when the complainant gave Jackson the first mes-
sage, $200.00; that it was at Zerkan's place; that Jackson
said he wanted to borrow more cash; that it was April or
June, 1902, that he first asked Corken; that he then spoke
to the complainant and told him he had to get some money
to build a building; that the complainant told him he had
only $400.00 and that was at home; that at the next meet-
ing the complainant let him have the $200.00; that four
days later Jackson asked the complainant for some more
money; that the Dober was pretty dear the sunday after-
noon; that it was a loud color, and he, himself, do it not
remember; that he had a conversation with Jackson at the trial
room Monday; that the contract of sale provided that the trial
looked like it; that settlement had it up a while and
to the complainant, "Satisfactory, this is good, and it is a
trouble; it is so good as it could"; that after that
money later the complainant then owed $200.00 more. A
magistrate was elected in autumn. June 19, 1903. Mentioned
of J. Hoffmann, $200.00 due January 1st A. D. Direct.
(signed) E. Clemens. (On above instrument be placed that
the contract of sale which accompanied it was that was the
Dober Chuck existence to the complainant, we on re-direct,
that at or time Atkins asked the complainant for a loan,
me not be could give him a [illegible] in money, assuming
not remember the date.

The only counterclaim of any note is that of two

occasion Wysocki said to the complainant, "What are you going to do about that? You had better move out from the house or pay rent"; and further, that if "he could get another customer today he would sell it"; that the complainant said, "Go ahead and do it". Suzan Pagin says she heard Wysocki in his office ask the complainant "What are you going to do, your contract came up a long time ago?" and that Szafranski said, "I have no money", that Wysocki further said, "I have got some party to buy that place, what are you going to do" and that the complainant answered, "Do what you want".

Zukowski's business was that of an interpreter and investigator, and getting personal injury cases. Suzan Pagin never knew the complainant, merely heard him called Szafranski, and did not know what property was referred to.

The evidence shows that while the complainant was in possession of the three rooms, Wysocki and his wife, on August 25, 1909 - five days before he committed suicide - executed a contract for the sale of the property to the Alfanos. That is hardly consistent with the claim on behalf of the defendants, that Wysocki had outstanding and uncanceled contract of sale to the complainant. Then, too, the evidence of Korgan and Prus is strongly convincing. The complainant had been in this country but a few years and could not read or write English, while on the other hand Wysocki was in the building and real estate business and needed money. The testimony of Zukowski and Suzan Pagin to what they claim they heard at Wysocki's office, at most is not strong or convincing. Of course, the complainant was shut out from telling what took place in Wysocki's life

was what put Lynn telling what Tom Dixon in Atwood's life is not natural or commanding. Of course, the complainant to what they claim they heard at Atwood's office, at most needed money. The testimony of Mckowski and Owen Tegin Atwood was to the outright and real estate promises and could not read or write English, while on the other hand complainant had known it this country but a few years and the evidence of Dorsey was also strongly contradicting. The unanswered portrait of Dorsey to the complainant. Then, too, half of the defendants, that Atwood had contemplated and Virginia. That is hardly consistent with the claim of Secured a contract for the sale of the property to the August 19, 1919 - five days before he committed suicide - in possession of the three rooms. Atwood and his wife, on

The evidence shows that while the complainant was Smallwood, and did not know what property was referred to. Ruth never knew the complainant, merely heard him called and investigator, and feeling personal injury ensue. Upon

Mckowski's business was that of an interpreter

"As what you want".

are you going to do" and that the complainant answered, that said, "I have got none early to pay that place, what that Smallwood said, "I have no money", that Atwood furgoing to do. Your contract came up a long time ago" and Atwood in his office was the complainant "What are you but said, "Go ahead and do it". Owen Dorsey says she heard another customer today he would sell it"; that the complainthe house or buy rent"; and further, that if "he could get going to do about that. You and better move out from occasion Atwood went to the complainant, "What are you

time. Still we are of the opinion that the evidence, by a clear preponderance, shows that Wysocki got the money through a promise to give a mortgage on the property in question, and that, therefore, the complainant is entitled to the relief he prayed for.

The decree will be reversed, and the cause remanded, with directions to enter a decree in accordance with the foregoing conclusions, and the prayer of the bill of complaint.

REVERSED AND REMANDED.

O'CONNOR, P.J. CONCURS;
THOMSON, J. DISSENTS.

time. Still we are of the opinion that the evidence
by a clear preponderance, shows that Wycoff got the money
through a promise to give a mortgage on the property in
question, and that, therefore, the complainant is entitled
to the relief he prayed for.

The decree will be reversed, and the cause re-
manded, with directions to enter a decree in accordance
with the foregoing conclusions, and the prayer of the bill
of complaint.

[illegible].

[illegible]
[illegible].

70 - 26193

VENITA GOULD JONES,

Appellee,

v.

MAXWELL M. JONES,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

223 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

This appeal is from a judgment rendered in the Municipal Court in favor of the plaintiff, Venita Gould Jones, against the defendant, Maxwell M. Jones, in the sum of $455.15 on an appeal bond signed by the defendant as surety, which bond was given in the Superior Court upon an appeal to this court by Harold R. Jones from a decree entered in the Superior Court in favor of the plaintiff.

The statement of claim of the plaintiff sets forth that in the month of June, 1919, she was the complainant and one Harold R. Jones was the defendant in a certain suit then pending in the Superior Court of Cook County; that a certain decree was entered in that suit from which the said Harold R. Jones prayed an appeal to the Appellate Court of Illinois for the First District; that Harold R. Jones and the defendant, Maxwell M. Jones entered into a certain appeal bond in that suit in the sum of $1000.00, dated June, 1919; that the said Harold R. Jones failed to prosecute his appeal with effect as conditioned in the bond and on October 7, 1919, an order was entered in the Appellate Court directing that the

AMELIA ROSETTA JONES,

Appellee,

vs.

RAYMART M. JONES,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This appeal is from a judgment rendered in the Municipal Court in favor of the plaintiff, Amelia Rosetta Jones, against the defendant, Raymart . Jones, in the sum of $250.19 on an account bond signed by the defendant as surety. Upon motion made by the defendant, Raymart M. Jones, in the municipal court of Chicago, entered an order directing that the cause be transferred to the Superior Court of Cook county, which was accordingly done. Thereafter, on October 7, 1919, an order was entered in the Superior Court directing that the said Amelia R. Jones dismiss her action as against said Raymart M. Jones and proceed to trial against the said Raymart M. Jones and the defendant, Raymart M. Jones entered into a trial without a jury for the first time; that Amelia R. Jones and the defendant, R. Jones proved an account in the Municipal Court of Chicago for dentures and entered in that suit from which the said Amelia R. Jones appealed in the sum of $100.00, dated June, 1919; that the defendant, Raymart M. Jones entered into a trial without a jury for the first time; that Amelia R. Jones and the defendant, Raymart M. Jones entered into a contract by which the said Amelia R. Jones was employed to make dentures for the defendant; that a certain bond was given in the Municipal Court upon an appeal to the Superior Court by Amelia R. Jones from a certain entered in the Municipal Court in favor of the plaintiff.

The statement of claim of the plaintiff was for the amount due on account, 1919, who was the complainant and that in the month of June, 1919, who was the defendant and that a certain bond was given in the Municipal Court upon an appeal to the Superior Court "over in favor of the plaintiff."

appeal of Harold R. Jones be dismissed out of said court; that the order dismissing the appeal is in full force and effect and the judgment appealed from still unpaid; that the defendant, Maxwell M. Jones, is indebted to the plaintiff by virtue of the bond in the sum of $455.15, being the amount of the decree appealed from, together with certain costs.

On March 29, 1920, the defendant, Maxwell M. Jones, filed an affidavit of merits. He therein admitted that he had executed the appeal bond as surety for Harold R. Jones, but claimed that he became surety so that the decree appealed from would be reviewed by the Appellate Court, and that inasmuch as the plaintiff refused to stipulate that the certificate of evidence in the cause appealed from should be incorporated in the transcript of the record in lieu of a copy, and a copy of the evidence could not be obtained in apt time, the plaintiff by her own act prevented and made it impossible for the said Harold R. Jones to prosecute his appeal with effect. It is further set forth in the affidavit of merits that the sole consideration upon which the appeal bond was executed was to obtain a stay from the amended decree appealed from until the determination of the cause, and that by reason of the dismissal of the appeal at the instance of the plaintiff the consideration for the appeal bond failed, and further, that since the dismissal of the appeal in this court and prior to the institution of the instant case in the Municipal Court an order was entered in the Superior Court in the cause mentioned in the bond; that Harold R. Jones pay to the plaintiff certain sums of money in full satisfaction and discharge of the amount mentioned in the bond here in question and also in another

appeal of Harold M. Jones be dismissed out of said court; that the order dismissing the appeal is in full force and effect and the judgment appealed from still unpaid; that the defendant, Maxwell K. Jones, is indebted to the plaintiff by virtue of the bond in the sum of $485.18, being the amount of the decree appealed from, together with certain costs.

On March 23, 1930, the defendant, Maxwell K. Jones, filed an affidavit of merits. In this he admitted that he had executed the appeal bond as surety for Harold M. Jones, but claimed that he became surety so that the decree appealed from would be reviewed by the Appellate Court, and that inasmuch as the plaintiff refused to stipulate that the certificate of evidence in the cause appealed from might be incorporated in the transcript of the record in lieu of a copy, and a copy of the evidence could not be obtained in apt time, the plaintiff by her own act prevented and made it impossible for the said Harold M. Jones to prosecute his appeal with effect. It is further set forth in the affidavit of merits that the sole consideration upon which the appeal bond was executed was to obtain a stay from the amended decree appealed from until the determination of the cause, and that by reason of the dismissal of the appeal at the instance of the plaintiff the consideration for the appeal bond failed, and further, that since the dismissal of the appeal in this court and prior to the institution of the instant suit in the Municipal Court an order was entered in the Superior Court as to the decree mentioned in the bond; that Harold M. Jones pay to the plaintiff certain sums of money in full satisfaction and discharge of the amount mentioned in the bond here in question and also in another

bond in a similar suit, and that that order automatically extinguished and satisfied the appeal bond herein sued upon.

On April 5, 1920, the trial judge on motion of counsel for the plaintiff struck the affidavit of merits from the files and the defendant electing to stand on his affidavit of merits judgment was then entered in favor of the plaintiff and against the defendant in the sum of $1,000.00 in debt and the sum of $455.15 damages together with costs. This appeal is taken from that judgment.

We are of the opinion that the affidavit of merits did not set up a good defense.

As to the contention that the principal in the bond was unable to perfect his appeal because the plaintiff refused to stipulate that the certificate of evidence in the cause appealed from should be incorporated in the transcript of the record in lieu of a copy, it is only necessary to say that the law does not require such a stipulation against the will of the plaintiff. Stipulations when made are voluntary.

As to the contention that by reason of the dismissal of the appeal on motion of the plaintiff there was then a failure of consideration and the bond became a nullity, it is sufficient to say that the failure of the defendant to perfect his appeal was entirely his own fault and under such circumstances it has been held in a number of cases that the dismissal of an appeal is equivalent to a legal and technical affirmance of the judgment below and entitles an appellee to claim a forfeiture of the appeal bond and prosecute an action thereon. McConnel v. Swailes, 2 Scam. 571; Grossman v. Cohen, 207 Ill. App. 186; Koelling v. Wachsning, 174 Ill. App. 321; Neagle v.

Dawson, 64 Ill. App. 538; Garrick v. Chamberlain, 97 Ill. 620. It is quite unlike such a situation as in Blair v. Reading, 103 Ill. 375, as there it was shown that the court had no jurisdiction of the subject of the appeal, and the bond, therefore, was void ab initio.

As to the further contention that, since the dismissal of the appeal in this court and prior to the institution of the instant case in the Municipal Court an order was entered in the Superior Court in the cause mentioned in the bond that Harold R. Jones pay to the plaintiff certain sums of money in full satisfaction and discharge of the amount mentioned in the bond here in question and of another bond in a similar suit, which order automatically extinguished and satisfied the appeal bond herein sued upon, we need only say that all these matters as far as the surety's obligation is concerned, were ex post facto, and there is no evidence that since he executed the bond, any part of thedebt has been paid or waived or in any way discharged, or that his rights as a surety have been impaired.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

Dawson, 64 Ill. App. 398; Bartlett v. Chamberlain, 97 Ill. App. 102 Ill. 378, we there it was shown that the court had no jurisdiction of the subject at the appeal, and the bond, therefore, was void ab initio.

We do the further question that, since the discharge of the appeal in this court and prior to the institution of the instant case in the Municipal Court an order was entered in the Superior Court in the cause mentioned in the bond that Harold R. Jones pay to the plaintiff certain sums of money in full satisfaction and discharge of the amount mentioned in the bond here in question and of such a bond in a similar suit, which order automatically extinguished and satisfied the appeal bond herein sued upon, we need only say that all these matters go far as the surety's obligation is concerned, sore ex post facto. and it is in no way that since be executed the bond, any part of the debt has been paid or waived or in any way discharged, or that his rights as a surety have been impaired.

Finding no error in the record, the judgment is affirmed.

ATTEST:

C. COSMO, R.J. VAN LENNEP, J. CONCUR.

(2036)

139 - 26306

ALBERT C. MUELLER,

Appellee,

v.

C. A. HENRY and HATTIE HENRY,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

223 I.A. 640[3]

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Albert C. Mueller, brought suit for wages and obtained a judgment - the cause being tried by the court without a jury - in the sum of $120.00, and $10.00 attorney's fees and costs. This appeal is therefrom.

The plaintiff's claim was that he worked for the defendants from March 20, 1918, at $20.00 a week and earned $480.00; that he had been paid $203.87, leaving a balance due of $276.13. The defendants by affidavit of merits denied that they had employed him as he claimed, or that they are indebted to him in any amount.

Mueller, the plaintiff; and his wife, and one Driver, testified for the plaintiff. The evidence of Mueller is that he worked for the defendant the first time in 1917, and for about a year at $20.00 a week; that he began again in February 1918, and that the defendant said "I will pay you the same as before", and did pay him $20.00 a week from the early part of February until March 20, 1918, after which he only gave him some small amounts, but from time to time promised to pay him

139 - 25308

ALBERT G. MUELLER,
Appellee,

v.

C. A. EMERY and HATTIE EMERY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE [illegible] delivered the opinion of the court.

The plaintiff, Albert G. Mueller, brought suit for wages and obtained a judgment - the cause being tried by the court without a jury - in the sum of $[illegible], and $[illegible] attorney's fees and costs. This appeal is therefrom.

The plaintiff's claim was that he worked for the defendants from March [illegible], 1918, at $[illegible] a week and earned $[illegible]; that he had been paid $[illegible], leaving a balance due of $276.13. The defendants by affidavits of merits denied that they had employed him as he claims, or that they are indebted to him in any amount.

Mueller, the plaintiff, and his wife, and one other, testified for the plaintiff. The evidence of Mueller is that he worked for the defendant the first time in 1917, and for about a year at $[illegible] a week; that he began again in February 1918, and that the defendants said they would pay him more than before, and did pay him $[illegible] a week from the early part of February until March [illegible], 1919, after which he only gave him some small amounts, but from time to time promised to pay him

in full; that on one occasion he said he would pay him as soon as he could make a loan on a certain building. The work done was in and about a garage. He says he worked for him until the latter part of August, 1918; that he left home at six in the morning, took no time off for meals and worked steadily till six in the evening; sometimes till seven sometimes till ten; that part of the time he was working with Mr. Henry on an invention; that he got altogether $240.00 after March 20, 1918; that he worked until September, 1918. The evidence of his wife is that in a conversation with Henry inSeptember 1918, Henry said that in a couple of weeks he would get a loan and would pay the plaintiff his pay and more, and would even buy him an automobile.

The witness Driver, a police officer, testified that he talked with Henry at his home in regard to his arrangement with the plaintiff and that Henry told him the plaintiff started at $20.00 a week and that he paid him right along.

For the defendants, one Samelow testified that in a talk with Mueller about May 15, 1918, the latter told him he did not care whether he got any wages or not as they were working on a patent and after the patent was finished, he was going to have his share of it.

The evidence of the defendant, Mrs. Henry, is that she and her husband employed the plaintiff; that on April 27, 1918, in her kitchen her husband said to the plaintiff" I will not be able to pay you any more wages." On cross examination she testified that she did not know whether her husband said that he would not be able to pay the plaintiff at all or just no more for a while.

in full; that on her occasion he said he would pay him as soon as he could make a loan of a certain building. The work done was in connection with a garage. He says he worked for Him until the latter part of August, 1918; that he left home at six in the morning, took no time off for meals and worked steadily till six in the evening; sometimes till seven sometimes till ten; that part of the time he was working with Mr. Henry on an invention; that he got altogether $250.00 after March 30, 1918; that he worked until September, 1918. The evidence of his wife is that in a conversation with Henry in September 1918, Henry said that in a couple of weeks or would get a loan and would pay the plaintiff him pay and more, and would even pay him an extravagant.

The witness Driver, a police officer, testified that he talked with Henry at his home in regard to his arrangement with the plaintiff and that Henry told him the plaintiff started at $25.00 a week but that he did his work right along.

For the defendants, one Hampton testified that in a talk with Weller about May 15, 1918, the latter told him he was not sure whether he got any wages or not as they were working on a partnership and after the method was finished. In one conversation he told him he owed him more or less.

The evidence of the defendant, Mrs. Henry, is that she and her husband occupied the latter's; that on April 27, 1918, in her kitchen her husband said to the plaintiff, "I will not be able to pay you any more wages." (Further examination

The evidence of Henry, the defendant, is that on April 27, 1918, he told the plaintiff he would have to lay him off because he (Henry) had no more money; that the plaintiff said, all right, that he had plenty of work in his own house, but that he would stay with Henry for 30 or 60 days without pay; that he paid the plaintiff between April 27 and October 13, 1918, the sum of $240.00; that he did try to get a loan of $2,000.00 on his house; that the plaintiff helped him on a patent. He denied telling the plaintiff that he would not pay him until he got the loan.

From the foregoing it is quite obvious that, according to the law, we would not be justified in overriding the judgment of the trial judge. At best there is merely a contradiction. It becomes a question of credibility, and we are by no means in such an advantageous position as the trial judge was in determining who was telling the truth. Hess v. Killerbrew, 209 Ill. 193:

> "Where the trial court, in a trial without a jury, has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed, on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence."

The contention of counsel for the defendants that the judgment, being for less than the difference between the total amount, figured at $20.00 a week, less the admitted payment of a total of $240.00, is, therefore, erroneous, is untenable. No complaint on that ground is made on behalf of the plaintiff, and no cross-errors are assigned.

It is conceded that the trial judge erred in allowing $10.00 for attorney's fees. The judgment will be affirmed

The evidence of Percy, the defendant, is that on April 27, 1919, he will be owed have to lay him off because he (Percy) had no more money; that the plaintiff said, all right, that he was ready of work in his own home, but that he would stay with Percy for 30 or 60 days without pay; that he had the plaintiff between April 27 and October 13, 1919, the sum of $500.00; that he did try to get a loan of $3,000.00 on its account; that the plaintiff helped him on a patent. He denied telling the plaintiff that he would not pay him until he got the loan.

From the foregoing it is quite evident that, according to the law, we would not be justified in overlooking the inadvertence of the trial judge. Whether there is strictly a deprivation, it becomes a question of credibility, and we are of the opinion that the trial judge was in advantageous position at the trial judge was in determining who was telling the truth. Dunn v. Silverstein, 200 111. 182.

> [illegible] the trial on it, in the trial which a jury, has had an opportunity of seeing the witness on the stand testifying their credibility, has [illegible] of fact, when the testimony is very conflicting, will not [illegible] unless it appears that the finding is against the manifest weight of the evidence."

The judgment is affirmed for [illegible] that [illegible] the [illegible], [illegible] total amount, [illegible] $ [illegible] a week, [illegible] the amounts [illegible] payment is a total of $[illegible], [illegible], [illegible], [illegible] unreasonable. To [illegible] [illegible] [illegible] [illegible] the [illegible], [illegible] no error-errors are [illegible].

It is [illegible] that the trial [illegible] [illegible] [illegible] [illegible] for attorney's fees. The [illegible] will [illegible]

in the sum of $120.00, and costs.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

In the name of JESUS, and decide.

AMEN.

O'ROURKE, P.J. AND THOMSON, J. O'HOURE.

170 - 26339

JOHN R. GEARY,
Appellee,

v.

JOHN J. HENRY,
Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

223 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 14, 1920, the plaintiff, John R. Geary, obtained a judgment by confession against the defendant, upon a lease, in the sum of $85.00. That judgment was made up of $45.00 for rent for the month of April, 1920; $20.00 for attorney's fees in a forcible detainer suit, and $20.00 for entering up the judgment by confession. On June 3, 1920, counsel for the defendant made a otion to vacate the judgment by confession. With that motion he filed an affidavit purporting to set forth the facts upon which the motion was based. The motion was continued until June 11, 1920, and on that date the trial judge, after ordering that the judgment by confession be reduced to $65.00 and costs, overruled the motion to vacate the judgment by confession. This appeal is therefrom.

The lease upon which the judgment was entered was dated April 1, 1919, and leased a certain flat consisting of six rooms on the second floor in the building known as 2200 east 75th Street, to be occupied as a residence from

[illegible]

[illegible]

[illegible]

May 1, 1919, to April 30, 1920, at a total rental of $540.00, payable in sums of $45.00 on the first day of each succeeding month. The lease contained a clause which provided for a confession of judgment incase of a default by the lessee, the defendant, as to any of the covenants therein mentioned.

The affidavit of the defendant recites, that he occupied the premises under the lease; that on March 12, 1920, a suit in forcible detainer was brought against him by the plaintiff, and on March 24th, judgment was entered in the Municipal Court in favor of the defendant;- that on March 25, 1920, another suit in forcible detainer was broughtagainst the defendant, and on March 30, 1920, judgment for possession was entered in favor of the plaintiff and against the defendant; that on March 31, 1920, the defendant moved his property from the premises and "that immediately thereafter this affiant was notified that the keys for said premises were delivered to the plaintiff herein and that this affiant is informed that on, to-wit, April 6, 1920, the plaintiff herein rented said premises to another party, and that affiant is further informed that said party was anxious and willing to move into and would have moved into said premises at once, and that it was then possible for said plaintiff to immediately secure another tenant who was willing to pay rent for the months of April at the same or a greater rental than this affiant alleges that he believes that said plaintiff could have secured such a tenant, willing to pay rental for the month of April, 1920, had he desired to do so; and keys to said premises were given to the party who rented same on April 16 and premises were occupied by said party from April 16 to April 30 inclusive."

The affidavit further recites that on account of the

May 1, 1919, to April 30, 1920, at a total rental of $[illegible], payable in sums of $[illegible] on the first day of each succeeding month. The lease contained a clause which provided for a confession of judgment in case of a default by the lessee, the defendant, as to any of the covenants therein mentioned.

The affidavit of the defendant recites, that he occupied the premises under the lease; that on March 1st, 1920, a suit in forcible detainer was brought against him by the plaintiff, and on March 2, judgment was entered in the Municipal Court in favor of the defendant; that on March 25, 1920, another suit in forcible detainer was brought against the defendant, and on March 30, 1920, judgment for possession was entered in favor of the plaintiff and against the defendant; that on March 31, 1920, the defendant moved his property from the premises and that immediately thereafter this affiant was notified that the keys for said premises were delivered to the plaintiff herein and that this affiant is informed that on, to-wit, April 6, 1920, the plaintiff herein rented said premises to another party, and that affiant is further informed that said party was anxious and willing to move into and would have moved into said premises at once, and that it was then possible for said plaintiff to immediately secure another tenant who was willing to pay rent for the months of April at the same or a greater rental than that of said lease; alleges that he believes that said plaintiff could have secured such a tenant, willing to pay rental for the month of April, 1920, had he desired to do so; and keys to said premises were given to the party who rented same on April 10 and premises were occupied by said party from April 12 to April 30 inclusive."

judgment for possession entered against the defendant the plaintiff waived any right to confess judgment for rent which thereafter became due; that the plaintiff had no right to confess judgment for attorney's fees as provided in the power of attorney giving him the right to confess judgment for failure to pay rent, and, further, that the amount allowed, being $40.00, attorney's fees, was unwarranted and unreasonable.

The question in the case is whether the affidavit in support of the motion to vacate was sufficient. It is the law that the affidavit should set out such facts as constitute a prima facie defense. State Bank of Clinton v. Parkhurst, 155 Ill. App. 101; Vennum v. Carr, 130 Ill. 308; Blue v. Keenan, 130 Ill. App. 312.

The affidavit recites that on March 30, 1920, the plaintiff obtained a judgment for possession and that on the next day the defendant moved his property from the premises. It further recites that the defendant was notified thatthe keys for the premises were delivered to the plaintiff. That, of course, is a mere statement of hearsay. It then recites that the defendant was informed, but does not say by whom, that on April 6, 1920, the plaintiff rented the premises "to another party" but it does not say to whom. It further recites that the defendant was informed that said party - but not giving his name - was anxious and willing to move into the premises and would have moved into the premises at once. That also is stated merely as hearsay. It further recites that "it was then possible for said plaintiff to immediately secure another tenant who was willing to pay rent for the month of April at the same or a greater rental * * * and * * *

judgment for possession entered against the defendant the plaintiff waived any right to confess judgment for rent which arose by reason of a tenancy at will." Id. at 1. and 4 - 5 month of April at the rate of a quarter rental : 5 and 4 - 5 because another tenant who was willing to pay rent for the that "it was then possible for said plaintiff to immediately rent also is stated clearly as pertinent. It further requires the premises and would have moved into the premises at once. but not (lying mis name - sue machine and willing to move into requires that the defendant was informed that said party - another party." But it does not say to whom. It further that on April 6, 1970, the plaintiff invited the premises "to el course, in a more statement of contract. It then requires keys for the premises were delivered to the plaintiff. That. It further requires that the defendant who notified plaintiff next day the defendant moved his property from the premises. plaintiff obtained a judgment for possession and that on the

The affidavit recites that on March 30, 1970, the Slow v. Koomen, 12C III. App. 318.

Parkmarkt, 185 III. App. 1C1; Vaughn v. Dair, 12C III. 2C8; connection a prior lapse defense. State Bank of Clinton v. the fact that the affidavit should set out such facts as in support of the motion to vacate was sufficient. It is

The question is the same in whether the affidavit

unascertainable.

owed, being $40.10. Attorney's fees, was ascertained and for failure to pay rent, and, further, that the amount power of attorney giving him the right to confess judgment to confess judgment for attorney's fees as provided in the waiver amounted to; that the plaintiff had no right

that he believes that said plaintiff could have secured such a tenant willing to pay rental for the month of April, 1920, had he desired so to do." The mere stating of a possibility and basing upon that statement of belief does not constitute such a statement of facts as, under the circumstances, the law requires.

The affidavit further states that "keys to said premises were given to the party who rented same on April 16 and premises were occupied by said party from April 16 to April 30 inclusive. It states no further circumstances on that subject and it may well be that the plaintiff did make some arrangement for a future tenant and allowed him occupation of the premises for the last two weeks inApril without charging rent therefor.

The condition expressed inthe latter part of the affidavit that the plaintiff had no right to confess judgment for rent after the judgment for possession was entered is untenable. According to the terms of the lease the judgment for possession did not destroy the plaintiff's right to confess judgment for rent. Grommes v. St. Paul Trust Co., 147 Ill. 634; Williams v. Short, 194 Ill. App. 478. We are of the opinion that the affidavit was so defective that the trial judge, in the exercise of reasonable discretion, was well warranted in overruling the motion and entering the judgment.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

that he believes that said plaintiff could have secured

affirmed.

finding no error in the record in the judgment is

overruling the motion and entering the judgment.

the exercise of reasonable discretion, but will warranted in

Stripe plaintiff was or delegating that the trial judge. In

Williams v. Ebert, 164 Ill. App. 478. We are of the opinion

judgment for rent. Stevens v. Mc. Coal Corp., 147 Ill. 394;

possession did not confer the plaintiff's right to confess

Upon. According to the terms of the lease the judgment for

for rent after the judgment for possession was entered is unten-

ability that the plaintiff had no right to confess judgment

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covering rent thereafter.

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Appil 30 inclusive. It makes no further circumstance on

and premises were occupied by said party from April 16 to

premises were given to the party who rented same on April 30

The affidavit further states that "duye to said

consequences" the jam continues.

not constitute such a statement of facts as, under the cir-

possibility and pursuing upon that statement of initial dere

1920, and be deemed on to do." The mere stating of a

sum a tenant willing to pay rental for the month of April,

that he believes that said plaintiff could have secured

15 - 25877

MELVILLE REEVES,

Plaintiff in Error,

v.

MICHAEL VAUGHN, et al,

Defendants inError.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

299 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Reeves, filed his declaration against the defendants alleging that they "on March 9, 1916, in Cook County, Illinois, with force and arms made an assault on the plaintiff and beat and ill treated him and detained him in prison there, without any reasonable cause, for the space of to-wit, 12 hours then next following, contrary to the laws of Illinois and against the will of the plaintiff * * * wherefore, the plaintiff says that he has sustained damage to the amount of $75,000 and therefore sues." The defendants involved filed a plea of the general issue. They also filed a special plea to the effect that the plaintiff ought not to have his said action for the reason that on the date in question "they were police officers of the City of Chicago, lawfully appointed inaccordance with the law, and as such officers they had the power and authority, and it was their duty under the law to arrest any person * * * for whose arrest a warrant was issued out of any court of competent jurisdiction, and these defendants, jointly and severally, aver and charge the fact to be that on, to wit, 9th day of March, A. D. 1916, they did arrest

MARYLEE ADAMS,

Plaintiff in Error,

vs.

ELDEMAR ADAMS, et al.,

Defendants in Error.

Error to

the City Court

of Utica.

Mr. Justice Hughes delivered the opinion of the court.

the said Melville Reeves by virtue and authority of a state warrant issued out of a court of competent jurisdiction". The warrant referred to was then set out in the plea in full and the plea then concluded in the usual manner, the defendants, jointly and severally, praying "judgment, if the said plaintiff ought to have his aforesaid action against them or either of them."

The plaintiff filed a replication to the general issue , joining issue on that plea, and a demurrer to the special plea. The trial court overruled the plaintiff's demurrer to the defendants' special plea and the plaintiff elected to stand by his demurrer, whereupon, the plaintiff's suit was dismissed and the court entered judgment in favor of the defendants and against the plaintiff for costs, to reverse which the plaintiff has perfected this appeal.

In our opinion, the trial court erred in holding that the special plea was a good plea in bar of the plaintiff's action as set forth in his declaration. It does not appear from any facts alleged in the plea that the plaintiff resisted arrest on the occasion in question nor that the defendants used no more force than was reasonably necessary to arrest the plaintiff and place him in jail; nor that they turned the plaintiff over to the proper authorities promptly; nor that such delay as there may have been in bringing the plaintiff before the magistrate, was not unreasonable, nor that the arrest took place within the jurisdiction of the defendants, namely, in the City of Chicago. The plaintiff contends that the plea was bad because it did not appear from anything alleged therein that the defendants were authorized to arrest the plaintiff under the warrant, nor that the plea referred to the grievance complained of in the declaration, nor that the

the said Melville Hoover by virtue and authority of a state warrant issued out of a court of competent jurisdiction".
The warrant referred to was then set out in the plea in full and the plea then concluded in the usual manner, the defendants, jointly and severally, praying "judgment, if the said plaintiff ought to have his aforesaid action against them or either of them."

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In our opinion, the trial court erred in holding that the special plea was a good plea in bar of the plaintiff's action as set forth in his declaration. It does not appear from any facts alleged in the plea that the plaintiff resisted arrest on the occasion in question nor that the defendants used no more force than was reasonably necessary to arrest the plaintiff and place him in jail; nor that they turned the plaintiff over to the proper authorities promptly; nor that such delay as there may have been in bringing the plaintiff before the magistrate, was not unreasonable, nor that the arrest took place within the jurisdiction of the defendants, namely, in the City of Chicago. The plaintiff contends that the plea was bad because it did not [illegible] from anything alleged therein that the defendants were authorized to arrest the plaintiff under the warrant, nor that the [illegible] referred to

defendants lawfully imprisoned the plaintiff in Cook County, but in our opinion none of those contentions are tenable.

For the other reasons above referred to however, we are of the opinion that the plea was subject to the demurrer filed.

The judgment of the Superior Court of Cook County, is, therefore, reversed and the cause is remanded to that court with directions to sustain the demurrer of the plaintiff to the special plea filed by the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

defendants familiarly imprisoned the plaintiff in Cook County,

but in our opinion none of these contentions are tenable.

For the other reasons above referred to however,

we deem of the opinion that the plea was applied to the

demurrer filed.

The judgment of the Superior Court of Cook County,

is, therefore, reversed and the cause is remanded to that

court with directions to overrule the demurrer of the plain-

tiff to the special plea filed by the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

Dicks v. P.C. &c. Railway, 3. Cir. Dec.

23 - 26032

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel Lucille Mackie,

Defendant in Error,

vs.

CHARLES MEYERS,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a bastardy proceeding. A jury was waived by the defendant and at the conclusion of the evidence the court found the defendant guilty and entered judgment, requiring the defendant to pay to the Clerk of the court, for the child in question $1,100 in installments as provided by the statute. To reverse this judgment the defendant has sued out this writ of error.

In support of the writ of error, the defendant contends that the trial court erred, both in admitting incompetent evidence and in sustaining objections to competent evidence that should have been admitted. While the complaining witness was on the stand and after she testified to the effect that the defendant had had sexual intercourse with her a number of times, beginning in January, 1918, and continuing until the summer of 1919, and had further testified that she became pregnant in January, 1919, and had advised the defendant of her pregnancy sometime in February, she was asked, "Did you talk with him (the defendant) at any time in reference to it? and she answered "Yes. His wife told me not to leave

IN THE DISTRICT COURT
OF OKLAHOMA.

CHARLES KEATING.

Plaintiff in Error.

vs.

No. 10023

THE PEOPLE OF THE STATE OF OKLAHOMA,

Defendant in Error.

ERROR TO

ex rel Lamille Banks.

MR. JUSTICE TAYLOR delivering the opinion of

the court.

Suit is a peculiar proceeding. A jury was waived by the parties and at the conclusion of the evidence the court is the jurors duly sworn judgment, rendering the verdict to day to the clerk of the court, for the state in question 21,716 in the alternative as provided by the statute. In reaching its judgment the defendant was found guilty this 3:15 of error.

In the [illegible] of error, the [illegible] that the defendant was the natural father of [illegible] that the [illegible] has been admitted. That the [illegible] evidence and in sustaining objections to competent evidence tends that the trial [illegible] by [illegible] in admitting incompetent

[illegible] by the [illegible] and the natural [illegible] that the defendant was [illegible] number of times, beginning in January, 1919, and [illegible] until the month of July, and then [illegible] before the [illegible] became pregnant in March, 1919, and [illegible] the [illegible] favorable of her testimony, counsel [illegible] by [illegible] in relation to [illegible] and she answered yes. Not [illegible] be [illegible] and she answered yes. Not [illegible] be [illegible] and she answered yes.

2321 1/2 Okl

MR. JUSTICE TAYLOR delivering the opinion of

the court.

the house until it was all over." The defendant objected to this and the objection was overruled. This was error. In the first place, the answer was not responsive and even if it had been it was incompetent and should have been stricken, in the absence of some showing to the effect that the defendant was present at the time of the alleged remark by his wife. It is urged by the State that inasmuch as the hearing was had before the court without a jury the judgment will not be reversed by reason of the admission of incompetent evidence as it will be presumed that the court disregarded such evidence and in reaching its finding considered only such evidence as was competent. This is not the rule. A similar contention was made in The People v. Reed, 287 Ill. 606, where the Supreme Court said, "The court, in the constant effort to sustain judgments which appear to be right on the merits, has frequently held in civil cases that if, upon a review of the record, the competent evidence sustains the judgment, it will not be reversed, and has said that the same harmful effect does not follow where a case is tried by a court without a jury as where the trial is before a jury * * * That rule is correct where upon a review of the record the court can say that the judgment is right regardless of the admission of incompetent evidence and erroneous rulings, but there is no course of sound reasoning justifying a conclusion that a court considering evidence competent and relevant as tending to prove the issue when ruling on the admission of testimony, regards it as incompetent and not tendingto prove the issue when finding the fact."

While the defendant was on the stand, testifying in his own behalf, he was asked, "Did she (the complaining witness) at any time when she went out the night before,

the house until it was all over.' The defendant objected to this and the objection was overruled. This was error. In the first place, the answer was not responsive and even if it had been it was incompetent and should have been stricken, in the absence of some showing to the effect that the defendant was present at the time of the killing [illegible] his own wife. It is urged by the State that inasmuch as the hearing was had before the court without a jury the judgment should not be reversed by reason of the admission of incompetent evidence as it will be presumed that the court disregarded such evidence and in reaching its finding considered only such evidence as was competent. This is not the rule. A similar contention was made in [illegible] v. [illegible], [illegible] Ill. [illegible], where the Supreme Court said, "The courts, in the consistent effort to sustain judgments which appear to be right on the merits, have frequently held in civil cases that if, upon a review of the record, the competent evidence sustains the judgment, it will not be reversed, but have held that the same harmful effect does not follow where a case is tried by a court without a jury as where the trial is before a jury. [illegible] That rule is correct only upon a review of the record the court can say that the judgment is right regardless of the admission of incompetent evidence [illegible] erroneous rulings, [illegible] course of [illegible] justifying a [illegible] a court [illegible] at [illegible], to prove the [illegible] [illegible] as incompetent [illegible] when finding the fact."

When the defendant [illegible], [illegible] in his own behalf, he [illegible] [illegible] witness) at any time [illegible] went out [illegible].

come home and tell you and your wife that she had been raped?" This was objected to as being leading, suggestive and immaterial. The court overruled the objection and the witness answered, "She did. I wouldn't say she just exactly put it what you would call raped. She said she was out with a young man and he was under the influence of liquor and while they were crossing a lot * * *". Here the court interrupted and addressing counsel for the State asked, "What was the ground of your objection?" and counsel answered that the first part of the question was leading and suggestive and that the other part was immaterial and added "It has not been brought out on the direct." Whereupon, the court said, "I will sustain the objection on that ground. I take it you would have to have shown something she said to him before you can go into it onthe cross-examination. If she admits it that would be the end of it. On that ground you urge I sustain the objection." This also was error. The original objection which went to the form of the question was good and if it had been sustained onthat ground, counsel might well have changed the form of his question, but there was no basis for holding the question bad on the ground that it had "not been brought out on the direct." We assume counsel must have been referring to the direct case of the State. It is apparent that thedefense was offering evidence that the complaining witness had had intercourse with men other than the defendant. This evidence was competent whether that subject had been mentioned on the direct case or not. The court seems to have had something in mind with reference to direct and cross-examination. This question was asked and ruling made while the defendant was on the stand in his direct examination.

It is urged that the trial court erred in sustaining the objections of the State to the testimony of defendant's

the objections of the state to the testimony of Calvert Ja-
ffrey.

It is asked that the trial court give an explanation
given in his direct examination.

question was asked and ruling made upon the objection was on the
in mind with reference to direct and cross-examination. This
on the direct were or not. The court is not to be considered
evidence are considered whether just applies here or not. This
had had reference with non crime plan the defendant. This
impeachment was sufficient evidence that the complaining witness
referring to the direct case of the state. It is a matter that
pronounce one on the stand." He mentions a most weak case here
holding the question had on the witness that it is "not good
question which went to the form of the question was used and
I submit the objection." This also was error. The original
mits it that would be the end of it. On that ground the mate-
before you on the trial of the cross-examination. If the ad-
mitte it was or have to have known somewhere she said to him
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and added "It has not been brought out on the direct." Sheinbein,
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ma under the influence of liquor and while they were clearing
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ed, "she did. I don't but she just exactly how it what you
ter. The court overruled the objection and the witness answe-
this was objected to as being leading, prejudicial and immater-
come home and tell her and your wife that she had been tobaco"

wife. The point is not tenable for she was not a competent witness. Illinois Statutes, Ch. 51, sec. 5 (J. & A. par. 5522).

Catherine Kelly testified for the defendant and was asked whether she ever had a conversation with the complaining witness in which the latter had told the witness about her marriage. Objection to this question was sustained and this ruling also is assigned as error. The objection was properly sustained, inasmuch as it was an effort to impeach the complaining witness and no proper foundation was laid for this testimony while the complaining witness was on the stand. Counsel for the defendant appreciated this for he recalled the complaining witness to the stand and attempted to lay the proper foundation by showing that she knew Catherine Kelly and by asking the witness the following question, "Between July, 1918, and February, 1919, did you tell Miss Kelly you were a married woman?" That question was objected to as being too indefinite and the court sustained the objection. In our opinion, this also was error.

This was a case in which the evidence was in sharp conflict. The testimony of the complaining witness was unsupported as she was the only witness against the defendant. While parts of her testimony seem very improbable and although she was contradicted in some respects by several of the witnesses other than the defendant, we are not of the opinion that the case is one which should be reversed without remanding, but that it should go back for a new trial.

For the reasons stated the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR. REVERSED AND REMANDED.

witness. Illinois decisions, Vol. 37, sec. 3 (1. & V. Dec. 2556).
wife. The point is not important for one who is not a competent

Ordinarily testify for the defendant and was asked whether she ever had a conversation with the complaining witness in which the latter had told the witness about her marriage. Objection to this question was sustained and this ruling also is accepted as error. The objection was properly sustained, inasmuch as it was an effort to impeach the complaining witness and no proper foundation was laid for this result. Counsel for the defendant subpoenaed this lady to be recalled in connection with the complaining witness was on the stand. Counsel for the defendant at no time attempted to lay the proper foundation by showing that the witness in the act was attempted to lay the proper foundation by asking the witness the following question, "Between July, 1913, and February, 1914, did you tell Miss Emily Jones that a married woman" [illegible] "ought sometimes to be objected to as being incriminating and the last question was objected to. In our opinion, this also was error.

[illegible] was a case in which the evidence was in sharp conflict. The testimony of the complaining witness was unsubstantiated in some material particulars by testimony of witnesses who were subpoenaed by the defendant. Although counsel for the defendant may have had a right to impeach the complaining witness by showing that the witness had told Miss Emily Jones that she was married, we do not think that the evidence that was offered was sufficient to warrant the jury in finding that the complaining witness had told Miss Jones that she was married. Mere proof of her statement would not be sufficient to impeach the witness. The statement must be made with the intent to deceive and to mislead. The mere fact that she was married would not necessarily indicate that she had told Miss Jones that she was married. She might have told Miss Jones that she was married, but that fact is not sufficient to show that she told her with the intent to deceive and to mislead. The mere fact that she was married would not necessarily indicate that she had told Miss Jones that she was married. She might have told Miss Jones that she was married, but that fact is not sufficient to show that she told her with the intent to deceive and to mislead.

For the reasons stated the judgment of the municipal court is reversed and the cause is remanded to that court for a new trial.

Reversed and remanded.

Mr. JUSTICE [illegible], dissenting.

But that it should be made for a new trial.

The case is one which should be referred to the municipal court of Chicago.

certiorari denied

333 - 26105

SIDNEY-MORRIS & COMPANY, a corporation,

Appellee,

v.

CHICAGO STATIONERS ASSOCIATION, a corporation, et al.,

Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

223 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for $15,000 recovered by the plaintiff, Sidney-Morris & Company, following a verdict for that amount returned by a jury in an action on the case, wherein the plaintiff charged that the defendants had conspired to ruin its business because it was underselling them as a competitor in the stationery supply business in the City of Chicago and because it would not maintain certain prices which it alleged had been fixed by the defendants through the Chicago Stationers Association, of which all the defendants were members. It was further alleged in the declaration that by intimidation and unlawful inducements, the defendants had caused various manufacturers, jobbers and wholesalers to refuse to continue selling the plaintiff, whereby the plaintiff was prevented from carrying out its contracts with its customers, wherefore plaintiff had been damaged to the extent of $100,000.

For some years prior to 1915, three brothers, William J. Pancoe (known as Jack Pancoe), Samuel Pancoe and Morris

GIBNEY-MORRIS & COMPANY,
a corporation,

Appellee.

v.

CHICAGO STATIONERS ASSOCIATION,
a corporation, et al,

Appellants.

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

MR. JUSTICE [illegible] delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for $15,000 rendered by the plaintiff, Gibney-Morris & Company, finding a verdict for that amount returned by a jury in an action on the case, wherein the plaintiff charged that the defendants had conspired to ruin its business because it was understanding that a competitor in the stationery supply business in the U.S. of Chicago was because it could not maintain certain prices which it alleged had been fixed by the defendants through the Chicago Stationers Association, of which all the defendants were members. It was further alleged in the declaration that by intimidation and unlawful means, the defendants had caused various manufacturers, who defendants had caused various manufacturers, to refuse to continue selling the plaintiff, whereby the plaintiff was prevented from carrying on its business with its customers, wherefore plaintiff was damaged to the extent of $[illegible].

For some years prior to 1918, three stenographers, William F. Hanson (known as Jack Hanson), Samuel Kandoss and Bertie

Pancoe, had been associated together in dealing in certain lines of stationery supplies, under the name of Universal Ribbon and Carbon Paper Company, which was not incorporated. In 1915, Morris and Jack Pancoe organized a corporation to engage in the general stationery and office supply business, under the name of Sidney Morris & Company. Morris Pancoe was president. Jack Pancoe was Secretary and Treasurer and in addition to the Pancoes, the Board of Directors included A. A. Greenberg and Nathan Grossman. Sam Pancoe was employed by plaintiff on salary and commission but he owned no stock. His connection with the plaintiff corporation began in November, 1915. At first the capital stock of the plaintiff company was $5,000 but in 1917 it was increased to $15,000 and in the following year to $50,000. Late in the latter year the plaintiff removed to larger quarters, where it had over twice the space which had been available at the first location. That the plaintiff's business increased rapidly and that it was conducting a large and prosperous business at the time this action was begun, is not denied but the plaintiff contends, that, were it not for the actions of the defendants, complained of, its growth would have been more rapid and its business would have increased to a materially greater extent.

The Chicago Stationers Association was organized in 1902 and was not incorporated. After this defendant had filed a plea of the general issue it asked leave to withdraw it and file a plea of nul tiel corporation but that motion was denied. It had four classes of membership, executive, auxiliary, individual and honorary. Executive members consisted of persons or firms who were retail or wholesale stationers located in Chicago. They paid dues in proportion to the size of their business. The defendants Stevens, Maloney

[illegible] had been associated together in dealing in certain [illegible] stocks, under the name of National Ribbon and Carbon Paper Company, which was not incorporated. In 1913, Harris and Jack Lawson organized a corporation to engage in the general advertising and selling supply business, under the name of Stacy Harris & Company. Harris Lawson was president. Jack Lawson was secretary and treasurer and in addition to its expense, the Board of Directors included W. A. Greenberg and Nathan Grossman. The Lawson was employed by plaintiff on salary and commission but he owned no stock. His connection with the plaintiff corporation began in November, 1912. At first the capital stock of the plaintiff corporation was $2,000 but in 1913 it was increased to $15,000 and in the following year to $30,000. Here in the Julius Lawson the plaintiff invested in larger quarters, where it had ever since the home which has been available at the first location. That the plaintiff's business increased rapidly and that it was conducting a large and prosperous business at the time this action was begun, is not denied but the plaintiff contends, that, more it not for the acting of the defendants, it would have been more rapid and the accumulated of, the steady money have been more rapid and the [illegible] of stock for the benefit of the defendants.

Numerous men & more [illegible] to a materially greater extent

The Ohio Blueprint Paper Co. was organized in 1908 and was not incorporated. [illegible] had [illegible] file a list of the General Terms it makes to withdraw it and file a list of any [illegible] description not that motion was denied. It was first alleged of membership, ownership, [illegible]. Indictment and [illegible]. Associate was [illegible] to the date of their business. They went down in prosperity [illegible] elected to Union. [illegible] placed of persons or firms who were retail or wholesale [illegible].

& Co. and Commercial Stationery & Loose Leaf Co. were executive members of the Association. Auxiliary members consisted of manufacturers of goods carried by stationers. Of the sixteen firms named in the bill of particulars, eight were auxiliary members of the Association at the time of the trial. The other manufacturers named in the bill of particulars were never members of the Association. None of the defendants ever held either individual or honorary memberships in the Association. The objects and purpose of the Association as set forth in its by-laws, were to bring the members into closer touch with each other; to reform abuses existing in the stationery business; to disfuse accurate and reliable information; to procure uniformity and certainty in the customs and usages of the trade, and thereby broaden the basis upon which the business was conducted; to act for or between its members in matters of controversy or adjustment, and generally to perform any act appertaining to the trade, not in conflict with the laws of the United States, or of the State of Illinois.

A former president of the Association testified that the activities of the Association consisted of frequent meetings of the members where they were addressed by different speakers along the lines of good merchandising; that the Association determined upon a number of general business policies, such as the hours for opening and closing, the hours of work for men and women employees, the time for Saturday closing and on what holidays to close; and eliminated many unfair trade practices, such as giving rebates on accounts and Christmas presents to encourage trade. Some time after its organization, the Association organization was changed to what was known as the Diamond plan, which involved the selection of a chairman, who

Democracy Plan, which involved the reduction of 9 chapters, the consolidation committees was brought to a short end because of the inability to encourage people. Even plan 2, for its elimination, the Executive Board reported an economic and financial crisis. Such as Plan 1 and 2 were not popular to the members of the Association. Multiply members combined to do. and Democratic principles & Purpose Dept Co. more concentrations of people carried by organizers. Of the six-teen items named in the bill of particulars, eight were unwarranted and Democratic principles & Purpose Dept Co. more concentrations of people carried by organizers. Of the six-teen items named in the bill of particulars, eight were unwarranted and

The other unwarranted names in the bill of particulars were names of the Association at the time of the trial. Many of the defendants never members of the Association. over held either initiated or Monterey membership in the Association. The objects and purposes of the Association as set forth in its By-laws, were to bring the members into closer touch with each other; to inform others existed in the communities; to promote unitedly and cordially in the customs and manners of the time, and specially promote the unity upon which the purposes was organized; to set for or between its members in matters of commercial or political moral materially to pertain only and exclusively to the times, not in conflict with your duty and objectivism to the times. of the Jews of the Holy Land, or of the Jews of Jihad.

A former president of the Association testified that the activities of the Association sometimes of Israel meetings of the members when they were objected by dissent because along the lines of "good government"; that the Association determined upon a number of "extra" business matters, enough as the Main Information and Jihad, the cause of war for war; and Native mobilees, the "Ma for Patriot closing and to that Politics to cease; Mr. Eisenhower made Polity Plans Plan-ning. Such as first reports on economics and Principles research to economic trade. Some plan a for its elimination, the Democracy Plan, which involved the reduction of 9 chapters, the consolidation committees was brought to a short end because of the inability to encourage people. Even plan 2, for its elimination, the Executive Board reported an economic and financial crisis. Such as Plan 1 and 2 were not popular to the members of the Association. Multiply members combined to do. and Democratic principles & Purpose Dept Co. more concen-

was a disinterested person not a member of the trade or industry to which the Association was attached. Under this plan this person was usually a lawyer. Such was the testimony of the defendant Ogren, who was a lawyer and the chairman of the Association at the time of the trial. This witness further testified that the Association also maintained certain social activities, such as a bowling league for the clerks, golf tournaments, an annual field day, various dinners and luncheons and an annual banquet and that in connection with its educational activities it was a part of the duties of the chairman to study the trade as a whole and the relation of the Association and its members to the trade; to secure, so far as possible, the adoption of uniform accounting systems, especially the one recommended by the Federal Trade Commission, for retail merchants; that during the war the Association took up such questions as joint deliveries and all questions submitted to business men generally by the Council of Defense; that the Association held frequent meetings at which lectures were given to the employees of members; that in the year previous to the trial the Association held a series of six salesmanship dinners, where addresses were given on salesmanship by a man from the Sheldon School of Salesmanship; that it was the duty of the chairman to make analyses and surveys of labor conditions, matters of clerk hire and comparative statistics on these subjects and conduct a campaign each year along educational lines for employees.

It was further in evidence that beginning in December 1917, the Association recognized a tendency on the part of some stationers to be careless in the matter of bookkeeping and keeping and figuring their overhead expenses, so the Association appointed a schedule committee whose duty it was to determine

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quarry to watch the executioner,was watching. Under this plan

thin persons are usually a failure. Not even the testimony of

the discovery (Mrs. who was a leader and the opinions of

the association at the time of the trial. This witness fur-

ther testified that the association also maintained certain

social privileges, such as a wedding lunche for the clerks,

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luncheons and an annual picnic and that in connection with

the organization was a part of the duties of the

ife one afternoon particularly it was a part of the duties of the

to shop downtown as Christ Internation and [illegible] shop-

ping for lunch secretary; that during the [illegible] noon

especially the one just ended by the waiter stole something.

es Donnie, the adoption of uniform accounting system?

Association and its members in the trade; it seems, to let

operation to study the trade as a whole the cost systems of the

ife one afternoon particularly it was a part of the duties of the

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-4-

what it considered fair prices on various articles in the trade and through bulletins which were distributed among its members from time to time, these prices were recommended for their adoption. It was the testimony of each of the members of the Association or those connected with it, who were witnesses on the trial, that members of the Association were under no obligation to follow recommended prices, that while the members generally followed these recommendations, frequently that was not the case; that no record was kept as to whether or not members maintained the prices recommended and that members might adopt them or not as they chose.

It is one of the contentions of the defendants on this appeal that the verdict and judgment are against the manifest weight of the evidence and that the judgment should therefore be reversed with a finding of fact.

To make out its case it was incumbent upon the plaintiff to establish by the evidence (1) that the defendants conspired in the manner alleged, (2) that said defendants or some of them committed some overt act or acts in furtherance of such conspiracy, and (3) that the plaintiff was damaged thereby. On the question of whether a conspiracy existed and acts had been committed by the defendants in furtherance of it, a large amount of testimony was submitted by both sides in the trial of the case. By this testimony the plaintiff endeavored to show that a number of different manufacturers had refused to fill its orders, unless it would agree to maintain the prices recommended by the Chicago Stationers Association and that certain individual defendants represented to the plaintiff that unless it became a member of the Association and agreed to main-

makes it become a matter of the Association and agreed to main-
tain impartial delegate represented in the plaintiff that car-
ried recommended by the Ohio-Pa Fleetwood Association the that car-
lift its orders, unless it be a delay to maintain the orders
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of much something, and (2) that the plaintiff was charged inten-
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bute counting by the amount alleged, (3) that main defendants or
plaintiff to estimates by the evidence (1) that the defend-

To make out its case it was important upon the
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or not members maintained the duties recommended and that members
that man not the case; that no jockey man have an another
members generally rejected these recommendations. Frequently
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of the Association or those connected with it, and were attend-
ance upon the meetings. It was the testimony of each of the members
expel objection. It was the testimony of each of the members
compare from time to time, these rules were recommended for
trade and through Building which were distributed among the
mare it contained fair prices on various articles in the

tain and did maintain such prices as the Association recommended, they would see that the plaintiff was unable to purchase certain lines of merchandise from the manufacturers. The defendents introduced evidence insupport of their position, that no such threats had been made by any individuals involved and that they had not requested or procured any manufacturers to refuse to sell the plaintiff goods but that such difficulties as the plaintiff may have experienced with manufacturers in this regard was due to a shortage of materials, in some instances, and in some others, to questions affecting the plaintiff's credit with the manufacturers in question. The plaintiff made out a stronger case with reference to some items alleged in the bill of particulars than it did with others. If the plaintiff's case rested entirely on the evidence referring to certain items and the alleged refusal of the manufacturers or jobbers involved to sell the plaintiff because of complaints of the Chicago Stationer's Association or its members, owing to the plaintiff's failure to maintain prices recommended by the Association, we would be inclined to the view that the verdict and judgment were against the manifest weight of the evidence. On the other hand, if the plaintiff's case rested on the evidence relating to certain other items, we would not be so inclined. On the whole evidence, our conclusion is that we would not be justified in finding that the conclusion of the jury, to the effect that there was such a conspiracy as the plaintiff alleged, to which the defendants were parties, and that overt acts had been committed, at least by some of the defendants, in furtherance of such conspiracy, was against the manifest weight of the evidence. We are not unmindful of the fact, so far as the oral testimony went, that the plaintiff's case rested entirely on the testimony of the three Pancoes, while there were some nine-

the testimony of the three witnesses, while it is also somewhat inconsistent, that the plaintiff's case rested entirely on the evidence of partisan friends who were present at the meeting. We are not unmindful of the fact, as far as the burden goes. We are not convinced the manifest weight of the evidence was such a conclusion. In particulars of alleged, it lacks in some of the documents, in particulars of the settlement meeting, and that every duty had been complied with by the plaintiff after the defendants' notice of the termination. The defendants' witnesses were positive, and their every duty had been complied with by the plaintiff after the defendants' notice of the termination. The defendants' witnesses were positive, and their testimony was not refuted by the plaintiff's case in chief. It is also true that the plaintiff's case rested entirely on the evidence of partisan friends who were present at the meeting. If the plaintiff's attorney came with reference to some items stated in the bill with the counterclaim in question. The plaintiff made out a case of duress, to guarantee relieving the plaintiff's breach was due to a shortage of material, in some instances, and plaintiff may have abandoned with counterclaim in time to sell the plaintiff could put such difficulties at the time. They did not requested by Stanard and counterclaim to refuse such interest may have been made by any indirectly involved and that such information evidence timeliness of short period, that no their times of materials from the counterclaim. The defendants would see that the plaintiff was unable to interpose certain and did maintain such prices as the Association recommended,

teen witnesses for the defendants, substantially denying the testimony of the plaintiff's witnesses, some of them with respect to some instances which were involved and others with respect to other instances. The plaintiff's case in this regard was materially strengthened by certain correspondence which was introduced in evidence. Witnesses for the plaintiff testified that the American Pencil Company, through their Mr. Kendrick, had notified the plaintiff that they could not fill its orders because the Chicago Stationer's Association was objecting because of the failure of the plaintiff to maintain its recommended prices; that the refusal of the American Pencil Company, referred to, resulted in certain legal proceedings being taken against it by the plaintiff; that after these proceedings were instituted one of the plaintiffs met Kendrick in the office of the attorney for the American Pencil Company and that in the course of conversation, which there took place, Kendrick handed one of the Pancoes a letter, purporting to be directed to the American Pencil Company by the plaintiff. Pancoe declined to sign the letter as requested, and refused to hand it back to the representatives of the American Pencil Company. This letter was introduced in evidence. It read as follows:

"American Pencil Company,
New York City, New York
Gentlemen:

Referring to discussion with your Mr. Kendrick relative to window display in which we have been offering for the past several weeks Venus pencils at 5c each, beg to advise that this has been discontinued.

We are desirous of at all times maintaining friendly relations between ourselves and the pencil manufacturers, and are only too glad to obtain the prices recommended by the Chicago Stationer's Association.

We assure you of our co-operation to this end, and further that it is our intention to, and we shall, in the future, at all times, endeavor to maintain prices on all pencils of your manufacture and offered by us to the trade at the prices recommended by the Chicago Stationer's Association.

Very truly yours,
(In Ink) C.K.M.M.G. Sidney Morris & Company"

teen witnesses for the defendants, substantially denying the testimony of the plaintiff's witnesses, some of them with respect to some instances which were involved and others with respect to other instances. The plaintiff's case in this regard was materially strengthened by certain correspondence which was introduced in evidence. Witnesses for the plaintiff testified that the American Pencil Company, through their Mr. Kendrick, had notified the plaintiff that they could not fill its orders because the Chicago stationer's association was objecting because of the failure of the plaintiff to maintain its recommended prices; that the refusal of the American Pencil Company, referred to, resulted in certain legal proceedings being taken against it by the plaintiff; that after these proceedings were instituted one of the [illegible] met Kendrick in the office of the attorney for the American Pencil Company and that in the course of conversation, which took place, Kendrick handed one of the [illegible] a letter, purporting to be directed to the American Pencil Company by the plaintiff. [illegible] declined to sign the letter as requested, and refused to hand it back to the representatives of the American Pencil Company. This letter was introduced in evidence. It reads as follows:

"American Pencil Company,
New York City, New York
Gentlemen:
Referring to discussion with your Mr. Kendrick relative to window display which we have been offering for the past several weeks [illegible] pencils at [illegible] each, beg to advise that this has been discontinued.
We are desirous of at all times maintaining friendly relations between ourselves and the pencil manufacturers, and are only too glad to obtain the prices recommended by the Chicago Stationer's Association.
We assure you of our co-operation in this regard, and further that it is our intention to, and we shall, in the future, at all times, endeavor to maintain prices on all pencils of your manufacture and of [illegible], as to the trade at the prices recommended by the Chicago Stationer's Association.
Very truly yours,

Neither Kendrick nor the attorney for the American Pencil Company, nor any other witness connected with that Company appeared to testify in this case.

One of the manufacturers from whom the plaintiff contended it had difficulty in procuring goods by reason of the complaint of the Chicago Stationer's Association, and certain of its members, by reason of the failure of the plaintiff to maintain Association prices, was the Crescent Brass Pin Co. In connection with the testimony with regard to that Company, the plaintiff introduced a letter received by it from one Rush of that Company, reading as follows:

> "Sidney Morris & Company,
> 5 S. La Salle Street,
> Chicago, Illinois.
> Gentlemen:
>
> We are in receipt of your letter of the 9th inst. and note that you are urgently in need of the steel Adamantine pins as ordered under date of May 14th.
>
> We regret to advise you that we have no Adamantine pins on hand for shipment, nor would we care to ship after being informed of the ridiculously low prices at which our goods are being disposed of.
>
> We have a nice established pin trade in Chicago, and rather than jeopardize this trade, we deem it advisable to discontinue supplying you.
>
> The Chicago dealers, to whom we cater, we of course refer to the representative stationery houses, are desirous of making a legitimate profit on this commodity and it is our desire to assist them in this regard.
>
> We regret exceedingly that we must take this action but the trade as referred to above must be protected.
>
> Very truly yours,
> KAR-HH (Signed) K.A. Rush."

In connection with the testimony referring to the transactions of the plaintiff with the Globe-Wernicke Co., one of the Pancoes testified to a conversation with Mr. Blaine, secretary and treasurer of the company, at Cincinnati in June, 1918, at which time he endeavored to place a large order with

Neither Hendricks nor the attorney for the [illegible] Pencil Company, nor any other witness connected with that Company appeared to testify in this case.

One of the manufacturers from whom the plaintiff contended it had difficulty in procuring goods by reason of the complaint of the Chicago Stationer's Association, and certain of its members, by reason of the failure of the plaintiff to maintain Association prices, was the Crescent Steel Pin Co. In connection with the testimony with regard to that Company, the plaintiff introduced a letter received by it from one Rush of that company, reading as follows:

"Sidney Morris & Company,
8 N. La Salle Street,
Chicago, Illinois.
Gentlemen:

We are in receipt of your letter of the 9th inst. and note that you are evidently in need of the steel [illegible] pins [illegible] under date of May 14th.

We regret to advise you that we have no [illegible] on hand for shipment, nor would we care to ship after being informed of the ridiculously low prices at which [illegible] are being disposed of.

We have [illegible] established [illegible] trade in Chicago, and rather than jeopardize [illegible], we deem it advisable to discontinue supplying you.

The Chicago dealers, [illegible] of the rules [illegible] unnecessary [illegible], are desirous of [illegible] a legitimate profit [illegible] in this locality.

We regret exceedingly [illegible] take this action but the trade [illegible] must be protected.

Very truly yours,
(Signed) [illegible] Rush."
TAR-HH

In connection with the testimony relating to the [illegible] manufacturers of the plaintiff's [illegible] the [illegible] Co., one of the persons testified to [illegible], secretary and treasurer of the company, of Cincinnati in June, 1918 [illegible]

that Company; that Blaine declined the order although the witness offered a draft for $1,000 on account and suggested that the balance of the order might be shipped to the plaintiff C.O.D.; that upon being asked why the Globe-Wernicke Co. would not sell the plaintiff Blaine stated that the plaintiff had been cutting prices in Chicago and the rest of the stationers were objecting to the Globe-Wernicke Co. selling the plaintiff and had said that they would throw out the goods of that manufacturer if the ~~ff-the~~ latter sold to the plaintiff; that the witness said he had some friends among the members of the Association, whereupon, Blaine told him to go back to Chicago and see some of them, naming them, and "get those people to O.K. your order", and "I will ship it double quick"; that Blaine said that the Globe-Wernicke Co. could not afford to "take a chance with all that business against yours". Blaine and another witness, an employee of the Globe-Wernicke Co. admitted he had the conference referred to with Pancoe, who said he would furnish as references some of the stationery dealers in Chicago, and thathe suggested Pancoe do so,naming some of them. He denied the substance of the conversation as testified to by Pancoe and stated, in effect, that the entire talk between the plaintiff's representative and Blaine had to do with the establishing of a basis for credit which the plaintiff desired the Globe-Wernicke Co. to extend to it. In connection with this incident, the plaintiff introduced two letters, the first under date of June 11, 1918, from the plaintiff to the Globe-Wernicke Co. and the second dated June 21, 1918, from the latter company to the plaintiff. These letters read as follows:

the latter according to the plaintiff. The letter read as follows:

Globe-Petrunke Co. and the second dated June 11, 1918, from the first named date of June 11, 1918, from the plaintiff to the defendant, the plaintiff introduced the letters, which were identical, the plaintiff desired the Globe-Petrunke Co. to understand the defendant to fill the order for the plaintiff. In connection with the letters, the plaintiff introduced the testimony of the witness Hall, an employee of the Globe-Petrunke Co. Hall admitted he had a conversation relative to the matter, who had another witness, an employee of the Globe-Petrunke Co. stated a change was in all that instances specimen prints". Blaine said that Globe-Petrunke Co. could not afford to C.O.D. our order", was "I will ship it double quick"; that and was none of them, reading them, and "get more people to the witness said he had some friends among the members of the Association, whereupon, Blaine told him to go back to Chicago manufacturer if he re-use letter said to the plaintiff; that and had said that they would throw out the goods of that were objecting to the Globe-Petrunke Co. making the plaintiff been cutting prices in Chicago and the rest of the materials not sell the plaintiff Blaine stated that the plaintiff had 0.C.D.; that upon being asked why the Globe-Petrunke Co. would the balance of the order might be shipped to the plaintiff been offered a deal for $7,000 on account and suggested that that Company; that Blaine declined the order although the wit-

"Chicago, June 11, 1918.

Globe Wernicke Co.,
Cincinnati, Ohio.
Gentlemen:-

ATTENTION OF SALES MANAGER.

Confirming our recent conversation when the writer was in your city with reference that you would be willing to sell us providing we could get consent from Mr. Gibbs of Shea, Smith & Company, Mr. Marshall of Marshall-Jackson & Company, and Mr. Stevens of Stevens, Maloney.

We wish to advise you that we believe it would be possible for us to get two of three above mentioned concerns to agree to have you sell us.

We should like to know whether it would be satisfactory to you if two of the three will be satisfied.

Kindly advise us by return mail so that we will be able to get the above mentioned concerns to agree to the proposition as made by you.

Thanking you for your prompt attention, we are

Very truly yours,
Sidney-Morris & Co."

"Cincinnati, June 21, 1918.

Sidney-Morris & Co.,
5 S. La Salle St.,
Chicago, Illinois.

Gentlemen:-

Replying to your inquiry, we feel that it will be best to have the recommendation of all three and will probably see them about the matter the next time we have a wholesale representative in Chicago.

Yours truly,
The Globe-Wernicke Co.,
J.M. Blaine, Jr.,
Sec. & Treas."

In our opinion these letters tended strongly to corroborate the account which the plaintiff's witness gave of the conversation between Pancoe and Blaine. Furthermore, it is hardly necessary to point out that it would be very unnatural, to say the least, for any manufacturer in discussing credit with a dealer, to require the latter to establish a basis for credit by procuring either the C.K. or the "recom-

"Chicago, June 11, 1910.

Olphe Gerardin Co.,
Dinsmoor, Ohio.
Gentlemen:-

ASSIGNMENT OF SALE AGREEMENT.

Confirming our recent conversation when the writer was in your city with reference that you would be willing to sell us procuring we would get advance from Mr. Olphe of Shaw, Smith & Company, Mr. Kerkhoff of Kerkhoff-Jackson & Company, and Mr. Stevens of Stevens, Delaney.

We wish to advise you that we believe it would be suitable for us to get two of three above mentioned companies to agree to pay you well we.

We should like to know whether it would be satisfactory to you if two of the three will be satisfied.

Kindly advise us by return mail so that we will be able to get the above mentioned document to effect to the proposition as made by you.

Thanking you for your prompt attention, we are

Very truly yours,
Sidney-Morris & Co."

"Dinsmoor, June 21, 1910.

Sidney-Morris & Co.,
5 S. La Salle St.,
Chicago. Illinois.

Gentlemen:-

Replying to yr inquiry, we feel that it will be best to have the assignment of this sale and will probably see Mr. Olphe the next time we have a personal interview in Chicago.

Yours truly,
The Olphe-Gerardin Co.,
J.Z. Bjerke, Jr.,
Sec. & Treas."

In our opinion these letters looked strongly as

mendation" of certain of his competitors.

In view of the correspondence to which we have referred, and taking all the testimony together, we are of the opinion that we would not be justified in setting aside the verdict and judgment appealed from, on the ground that they were against the manifest weight of the evidence on the question of the alleged conspiracy.

But, even though a conspiracy existed, as alleged, and overtacts were committed by the defendants or some of them, in furtherance of the conspiracy, it is incumbent upon the plaintiff to show that it had suffered actual damages as the result of it, before there could be a recovery. In its brief the plaintiff concedes that such is the law. In 5 R.C.L. p.1091, the author states that in such an action as this, special damage must be proved, citing Quinn v. Leathem, (1901) A.C. 495, holding that a combination of two or more, without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to trade with him or continue in his employment, is actionable, if it results in damage to him. In 12 C.J. p. 581, it is pointed out that unless acts are done by the conspirators "which acts result in damage", no civil action lies. "The gist of the action is the damage and not the conspiracy." Such was the holding of this court in Hyman v. Burmeister, 216 Ill. App. 98; Doremus v. Hennessy, 62 Ill. App. 391, affirmed 176 Ill. 608; Martin v. Leslie, 93 Ill. App. 44; Hall v. First Natl. Bank of Chicago, 120 Ill. App. 441; Duffy v. Frankenberg, 144 Ill. App. 103. In the latter case this court held that a civil action cannot be maintained for a mere conspiracy. Damages of an actual

...mendation" of certain of his competitors.

In view of the correspondence to which we have referred, and making all the customary deference, we are of the opinion that we should not be justified in acting upon the verdict and judgment appealed from. On the ground that they note against the manifest weight of the evidence on the question of the alleged conspiracy.

But, even though a conspiracy existed, as alleged, and overtacts were committed by the defendants or some of them, in furtherance of the conspiracy, it is incumbent upon the plaintiff to show that it had suffered actual damages as the result of it, before the same could be recovered. In the brief the plaintiff concedes that such is the law. In 9 R.C.L. p.1201, the author states that in such an action as this, special damage must be proved, citing Quinn v. Lenihan (1901) 4 C. 438, holding that a combination of two or more, without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to trade with him or continue in his employment, is actionable. If it results in damage to him. In 12 C.J. p. 691, it is pointed out that unless acts are done by the conspirators "which in each result in damage and civil action lies. "The gist of the action is t = damage and not the conspiracy." Such was the holding in this court in Mayer v. Spiegelhoff, 126 Ill. App. 23; Kinnare v. Donovan, 92 Ill. App. 691, affirmed 192 Ill. 64; Larkin v. Loftus, 202 Ill. App. 64; Doyle v. Mutual Aid, Post of Chicago, 190 Ill. App. 467; Seelig v. Kirschenbaum, 164 Ill. App. 103. In the latter case this court held that a civil action cannot be maintained for a mere conspiracy. Damage of an actual

and not punitive character must flow from the conspiracy before the action can be maintained. Where actual damages are proven, exemplary damages may also be recovered.

In the case at bar the jury were instructed that if they found the issues in favor of plaintiff they might allow exemplary or punitive damages. In Duffy v. Frankenberg, supra, this court, citing Martin v. Leslie, supra, held that without proof of actual damage, vindictive or punitive damages cannot be allowed.

But, the plaintiff, although conceding this to be the law, contends that its evidence included proof of actual damage. The only proof referred to by the plaintiff in this connection and the only proof we have been able to find in the record on the subject of alleged actual damage, involves an order which Morris Pancoe testified he endeavored to place with the Globe-Wernicke & Co. over the telephone on February 10, 1917. This is the only witness who testified about this order and there is much about his testimony that is quite unsatisfactory. He testified that he called up the Chicago office of Globe-Wernicke Company and "talked with the sales manager, a Mr. Merl or Mayer or something like that. I wouldn't be sure, that is the way it is pronounced. It may be May, Merl, May, something like that." On cross-examination he said he talked with a Mr. Mayer, as near as he could remember; that he asked to talk with the wholesale department and that when he got the party in question, the witness said, "Take an order" and that the party said, "All right, What is it?" and that he then proceeded to give the order. As to the name of the party in question, the witness said he was not positive whether it was Mayer or Merl, but that it was something that sounded like

and not punitive character exist then from the conspiracy are drawn, exemplary damages may also be recovered.

In the case at bar the jury were instructed that if they found the issue in favor of plaintiff they might allow exemplary or punitive damages. In Duffy v. Brandenburg, supra, this court, citing Restis v. Poulos, Sands, Dyer, supra, held that without proof of actual damage, vindictive or punitive damages cannot be allowed.

But, the plaintiff, although conceding this to be the law, contends that the evidence included proof of actual damage. The only proof referred to by the plaintiff in their connection and the only proof we have been able to find in the record of alleged actual damage, Instances in the record of the employment of a Mr. Bell or Zeller or Weinstein like that. I wouldn't be of Hyde-Eastlake Company and "linked with the main manufacturing and it is what counts the difficulty. He testified that he called up the Chicago office the telephone on February 20, 1917. Like is the only witness who testified about this matter with Hyde-Eastlake & Co. over the telephone (the) an order which certain amounts could be canceled is there is the record of alleged actual damage, Instances their connection and the only proof we have been able to find no damages. The only proof referred to by the plaintiff in the law, contends that the evidence included proof of actual are drawn, exemplary damages may also be recovered.

-12-

Before the motion can be maintained. Where actual damages and not punitive character exist then from the conspiracy

that. He further said, "I can find out from our records exactly who that was." Counsel for defendants asked him if he would do that and give him the name later and he said he would. On the afternoon of the following day, on direct examination, this witness was asked if he remembered the name of the sales manager of the Globe-Wernicke Company to whom he gave his order on February 10, 1917 and he said that it was either Morrow or Merll, "that is as near as I can remember. * * * I met him once in the Boston Store with Mr. Smith. * * * the buyer of the Boston Store. * * * I was introduced to him as the sales manager, and he explained to me that he traveled around, that he has an office here and at times he goes around to cover other towns in the vicinity and that his headquarters are here at the Chicago office." On his direct examination, this witness testified he was told by the representative of Globe-Wernicke that they would not take the order, "that they said - before I gave the order, they said, Who is this? then I said, Sidney Morris & Company and then I gave the order."

On cross examination this witness testified that he called up the Globe-Wernicke Co. and asked to talk with the wholesale department, and upon getting the party in question he said, "Take an order, and the party said, all right, what is it; and that he then proceeded to give the order." He further testified that he had kept a memorandum of the order in question and that the order was as follows:

"Five gross No. 50 Columbia cases, 2 gross No. 60 Columbia cases, 10 Gross A. to Z No. 11 box files, 1 gross 1 to 31 box files No. 11, 10 gross of arches and boards, 3 gross letter-size, 2 gross cap size, 5 gross No. 3 every day files, 2 gross No. 4 every day files, 2 gross No. 1 every day files, 1 gross No. 2 every day files, 5 gross Jumbo A to Z files, 1 gr

that. He further said, "I can find out from our records exactly who that was." Counsel for defendants asked him if he would do that and give him the name later and he said he would. In the afternoon of the following day, on direct examination, this witness was asked if he remembered the name of the sales manager of the Globe-Wernicke Company to whom he gave his order on February 10, 1917 and he said that it was either Morrow or Merrill, "that is as near as I can remember. * * * I met him once in the Boston Store with Mr. Smith. * * * the buyer of the Boston Store. * * * I was introduced to him as the sales manager, and he explained to me that he traveled around, that he had an office here and at times he goes around to cover other towns in the vicinity and that his headquarters are here at the Chicago office." On his direct examination, this witness testified he was told by the representative of Globe-Wernicke that they would not take the order, "that they said - before I gave the order, they said, Who is this? then I said, Sidney Morris & Company and then I gave the order."

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"Five gross No. 50 Columbia cases, 3 gross No. 5 Columbia cases, 10 gross A. No. 2 Co. 11 box files, 1 gross 1 wo 21 box files No. 11, 10 gross of arch and boards, 3 gross letter-size, 2 gross cap size, 3 gross No. 3 every day files, 4 gross No. 4 every day files, 2 gross No. 1 every day files, 1 ...

Jumbo 1 to 31 files 5 gross wood letter clip boards, 1 gross cap-size clip boards, 1 gross Congress tie envelopes, 1 - it don't say envelopes, but that is what they are."

It would seem from this testimony that the witness meant to say that he called up the party in question and that the party first ascertained who it was who wanted to place the order and upon being advised that it was Sidney Morris & Co., the party said, in substance, "All right, what is the order?" and that he proceeded to give it as detailed above and that after all that, the party advised the witness that Globe-Wernicke would not take the order.

This witness further testified that upon this order being refused by the Globe-Wernicke Co., the plaintiff went ahead and purchased the goods elsewhere; that he could not say they tried to buy them elsewhere on February 10; that they "might have tried within a week;" that he did not remember just how long it was or from whom they first tried to buy goods; that "sooner or later" they started to buy goods from McClurg; that they did not try to get any Chicago firm to fill the whole order; that they bought some of the goods from the Associated Stationers Supply Co., which sold goods at wholesale; that they did not ask the Associated Stationers Supply Co. to fill the entire order; that if the company had filled the entire order it could have been purchased at a smaller price than was paid to the various concerns from whom purchases were made; that goods purchased from Globe-Wernicke Company would come from Cincinnati and the plaintiff would have to pay cartage from the factory to the freight depot in that City and the railroad freight charges from Cincinnati to Chicago. One of the items this witness testified the plaintiff purchased from jobbers in 1917, by reason of the refusal of its order by the Globe-Wer-

jumbo 1 to 22 titon 8 green wood letter city
velopes, but that is what they are."
Gargreen Six Catalogue, 1 - it don't pay co-
boards, I guess cop-eyes ugly boards, I guess

it would seem from this testimony that the witness meant to say that, the party maintained the witness that Hydro-Electric could not take the order.

This witness further testified that upon this order being referred to Hydro-Electric - &c., the plaintiff went and Enterprise the "order expenses; that he could not they "might have tried a week;" that in all her knowledge later has found it was or from whom they first tried to buy goods; that "account or later" they started to buy cooper from Wolfare; that they did merely to say and Iphigenia like to fill the whole order; that they first went of the wire from the Associated Steelworks Limited &c., which were known at Montgomery; that they did not say the Vice-Admiral Chairman Hydro &c. to fill the order but was the Associated Steelworks Limited &c., which were known at Montgomery; that they first tried to buy goods; that "account or later" they started to buy cooper from Wolfare; later has found it was or from whom they first tried to buy goods; they "might have tried a week;" that in all her knowledge and Enterprise the "order expenses; that he could not having referred to Hydro-Electric - &c., the plaintiff went

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1917, by reason of the refusal of the order of the Hydro-Electric this witness testified the plaintiff Enterprise in freight charges from Montgomery to Ontario. The of the items the Factory to the Factory except in that city on the railroad Standpoint for the plaintiff would have to pay Ontario line Goods Purchased Line Hydro-Electric Supply Co. were less to the various Companies line when purchased. Save cases; that it would have been Montgomery at a smaller figure than was entire order but if the Company had filled the entire order did not pay the Associated Steelworks Supply Co. to fill the Steelworks Supply Co., which were known at Montgomery; that they order; that they first went some of the wire from the Associated that they did merely to say and Iphigenia like to fill the whole

nicke Co., was referred to as "Shannon transfer cases" or "Shannon files". On cross-examination it was shown that this article was made by several manufacturers other than the Globe-Wernicke Company and among them was Yawman & Erbe, Cook & Cobb, and Corbett Manufacturing Company; that the plaintiff had been a customer of Yawman & Erbe during all the time they had been in business; and had done a very large business with them. The witness could not remember whether the plaintiff tried to buy these files from this manufacturer at the time the purchase was made from the jobber in 1917, or what Yawman & Erbe's price was, although he admitted he knew of no reason why plaintiff could not have purchased from this concern at least part of the files plaintiff had ordered from the Globe-Wernicke Co., and which were also manufacturer by Yawman & Erbe.

After detailing the attempted telephone order to the Globe-Wernicke Company, in February, 1917, the witness testified to a long list of purchases from other concerns as follows:

"Feb. 15, 1917, 2 Harvard letter files, from McClurg & Company
Feb. 23, 1917, 1 gross Supreme letter files, from McClurg & Co.
Feb. 27, 1917, 1 doz. Mammoth (Jumbo) files " " " "
March 6, 1917, 1/6 gross Mammoth letter files, party not given.
March 15,1917, 1 gross Supreme letter files, from McClurg & Co.
" 22,1917, ½ gross Mammoth letter files, party not given.
" 30,1917, 1 gross Supreme letter files, from McClurg & Co.
April 19,1917, 1 gross Supreme letter files, party not given.
May 15,1917, ½ gross Imperator letter files, party not given.
May 18,1917, 2 doz. No. 4 every day files, from E. H. Walsh.
June 5,1917, 1/6 doz. every day files, from McClurg & Co.
" 17,1917 1 gross Superior letter files, from McClurg & Co.
" 25,1917, 8 doz. No. 3, every day files, from E.H. Walsh.
July 1,1917, 2 gross Supreme letter files, from McClurg & Co.
Aug. 4,1917, 4 doz. Shannon files, party not given.
" 7,1917, 1 gross Superior letter files, from McClurg & Co.
" 30,1917, 1 gross Imperator files, from McClurg & Co.
" 30,1917, 1 gross Imperator files, party not given."
Oct. 25,1918, 24 doz. No. 4 every day files, party not given.
" 30,1917 1 doz. No. 4 every day files, Associated Stationers Supply Company.
Nov. 5, 1917, 1 3/4 doz. No. 3 every day letter files, party not given.
Nov. 6, 1917, 1½ doz. No. 3 every day files, party not given.
Nov. 16, 1917, 3 doz. every day files, Associated Stationers Supply
Nov. 29, 1917, 6 doz. every day files, Associated Stationers Supply
Nov. 28, 1917, ½ gross Imperator files, party not given.

nicke Co., was referred to as "Common Counsel cases" or "Common fits". On cross-examination it was shown that this article was made by several manufacturers other than the Glob-Varnicke Company and among them was Yawman & Erbe, Cook & Cobb, and Gorbett Manufacturing Company; that the plaintiff had been a customer of Yawman & Erbe during all the time they had been in business; and had done a very large business with them. The witness could not remember whether the plaintiff tried to buy these files from this manufacturer at the time the purchase was made from Lubker in 1917, or what Yawman & Erbe's price was. Although he admitted he knew of no reason why plaintiff would not have purchased from this source as least part of the files plaintiff has ordered from the Globe-Varnicke Co., and which were also manufactured by Yawman & Erbe.

After defaulting the attached telephone order to the Globe-Varnicke Company, in February, 1917, the witness testified on a long list of questions from other defendants in Poli-

Feb.	14,	1917.	3 Morrell Junior files, Iver Johnson & Company
Feb.	27,	1917.	1 Arrow Quarter Inches Taper, Iron Mountain & Co.
Feb.	27,	1917.	1 doz. Samson (Curio) files " " " "
March	6,	1917.	1½ gross Monarch Junior files, Parts not given.
March	19,	1917.	1 gross Champion Junior files, Type described on Jo.
"		22, 1917.	½ gross Monarch Junior files, Parts not given.
"		30, 1917.	1 gross Monarch Junior files, Iron Mountain & Co.
April	13,	1917.	½ gross Arrow Machine Files, Parts not given.
May		19, 1917.	1 doz. No. 4 every day files, Iron M. Main.
June		5, 1917.	1½ doz. every day files, Iron Mountain & Co.
"		17, 1917.	1 gross Master Junior files, Iron Mountain & Co.
"		28, 1917.	8 doz. No. 3, nearly dog files, Iron M.M. Main.
July		1, 1917.	2 gross Modern Junior files, Iron Work's Mfg. & Co.
Aug.		6, 1917.	4 doz. Common files, Parts not given.
"		7, 1917.	1 gross Cabinet Junior files, Iron Mining & Co.
"		20, 1917.	1 gross Champion files, Type Mountain & Co.
"		22, 1917.	1 gross Independent files, Parts not given.
Dec.		22, 1919.	2 doz. No. 4 every day files, Parts not given.
"		31, 1917.	1 doz. No. 4 every day files, Parts not given.
Nov.		6, 1917.	1½ doz. No. 3 every day files, Parts not given.
Nov.		6, 1917.	14 doz. No. 3 every day files, Parts not given.
Nov.	16,	1917.	3 doz. every day files, Iron Mountain & Co.
Nov.	20,	1917.	6 doz. every day files, Iron Mountain & Co.
Nov.	28,	1917.	1 doz. No. 4 every day Junior files, Parts not given.
Dec.	3,	1917.	1 doz. No. 4 every day files, Parts not given.
Dec.	6,	1917.	1 doz. No. 4 every day files, Parts not given.

Nov. 30, 1917, 1/6 doz. every day files, Party not given.
Dec. 1, 1917, 4 doz. No. 3 every day files, party not given.
Dec. 5, 1917, 2 gross letter files, party not given.
Feb. 5, 1918, 4 gross files, from Boston Store.
Feb. 5, 1918, ½ gross Supreme letter files, from McClurg Co.
Feb. 25, 1918, 1 gross Supreme letter files from McClurg & Co.
Mar. 11, 1918, 4 doz.every day files, Associated StationersSupplyCo
Apr. 9, 1918, ½ gross Supreme letter files, party not given.
Apr. 10,1918, 2 doz. Imperator letter files, party not given.
Apr.19, 1918, 2 doz. Imperator letter files, party not given.
May 3, 1918, 1 gross Supreme letter files, party not given.
May 14, 1918, 2 doz. Imperator files, party not given.
June 1, 1918, 1 gross Supreme letter files, party not given.
June 3, 1918, 1 gross Supreme letter files, from McClurg & Co.,
June 4, 1918, 1½ gross Supreme letter files, party not given,
Hune 6, 1918, 1½ gross Supreme letter files, party not given.
June 6, 1918, 1½ gross Supreme letter files, party not given.
June 16, 1918, 1 gross Supreme letter files, from McClurg & Co.
No date, 10½ doz.No.50 Shannon transfer cases, from McClurg.
No date, ½ doz. Legal every day files, no party given."

In connection with his testimony as to each of these purchases, the witness gave the purchase price, which he stated to be a fair market price, and he also gave the manufacturer's price on the article purchased, meaning thereby, the Globe-Wernicke price. He testified that these purchases were made "to fill our orders. To replace the order we placed with Globe-Wernicke & Co., which was not filled by them." He was asked what the relation was between these purchases and the order of Feb. 10, 1917, and he answered, "They would not take any more orders and we had to get the goods in order to keep our door open." There is no testimony in the record as to what, if any, reason was given for the refusal of the order of February 10, 1917, if there was such a refusal, nor is there any testimony in the record as to any subsequent attempt of the plaintiff to buy goods from the Globe-Wernicke Co. Of course this plaintiff could not prove damages by showing the refusal of an order, tendered to the Globe-Wernicke Co. for certain goods, and then prove purchases it had made from other concerns, during the next year and a half, these purchases involving some goods not included in

May. 30.	1917.	1½ doz. every day filler. Party not given.
Dec. 1.	1917.	4 doz. No. 3 every day filler, party not given.
Dec. 5.	1917.	2 gross Jester Tilde, party not given.
Jan. 5.	1918.	4 gross filler, Iron Mountain Store.
Feb. 8.	1918.	½ gross Supreme Letter filler, Iron Mountain Co.
Feb. 20.	1918.	1 gross Supreme Letter filler from Medinurg & Co.
Mar. 11.	1918.	4 doz. every day filler, Associated Stationers Supply Co
Apr. 9.	1918.	½ gross Supreme Letter filler, party not given.
Apr. 10.	1918.	2 doz. Inspector Letter filler, party not given.
Apr. 19.	1918.	2 doz. Inspector Letter filler, party not given.
May 3.	1918.	1 gross Supreme Letter filler, party not given.
May 14.	1918.	2 doz. Inspector filler, party not given.
June 1.	1918.	1 gross Supreme Letter filler, party not given.
June 3.	1918.	1 gross Supreme Letter filler, from Medinurg & Co.,
June 4.	1918.	1½ gross Supreme Letter filler, party not given.
June 6.	1918.	1½ gross Supreme Letter filler, party not given.
June 8.	1918.	1½ gross Supreme Letter filler, party not given.
June 10.	1918.	1 gross Supreme Letter filler, from Medinurg & Co.
Xx date.		10½ doz. Mo. St. Simeon transfer cards, from Medinurg,
No date.		½ gro. Legal every day filler, no party given."

In connection with the testimony as to each of these purchases, the witness made the purchase order, which he stated to be a fair market price, and he also made the manufacturer's price on the article purchased, meaning thereby, the Globe-Werniche price. He testified that these purchases were made "to fill out orders. To replace the items we placed with Globe-Wernicke & Co., which are not filling by them." He was asked what the relation was between these purchases and the duty of Van, Ic. 1917, and he answered, "They were not sale but were stock since I had no part in the sales." He was asked what end we had to get the goods in order to keep our door open."

There is no testimony in the record as to what, if any, reason was given for the refusal of the order of February 1., 1917, it appears that the defendant in the record as it stands, or in the testimony to the extent it has been brought to my attention to May Goode Bacon counter. By removing the refusal of an order, I notice a great change. Of course this statement cannot vary from the Globe-Wernicke Co. for certain goods, and also from Globe Wernicke Co. for certain goods, but in the main, I notice a

the alleged order, and the purchases being for amounts greatly in excess of those involved in the alleged refused order, and in some instances it appearing that the prices paid increased through the period in question. Nor can damages be proven which are claimed to have resulted from the refusal of an order given to a manufacturer, by showing purchases made from others, some of whom were jobbers, and some retailers, especially where it is shown that the goods could have been purchased from other manufacturers and at manufacturer's prices. As to the so-called wholesale prices of the Associated Stationers Company, Pancoe admitted they were higher than plaintiff's retail prices.

For the defendants, one Murphy testified that he was the assistant manager of the Globe-Wernicke Company at the Chicago branch and had been with that firm for 23 years; that there was nobody connected with the company whose name was similar to any of the names mentioned by Morris Pancoe; that their Chicago sales manager was one Bardwell, and that the Chicago office of the Company did not sell at wholesale to dealers except as an accommodation; that in 1917 the Company had a wholesale salesman who came from Cincinnati and made his headquarters at the Chicago office and took wholesale orders; that this representative spent very little time at the Chicago office, not more than one-half an hour at a time and that he was not in Chicago more than a day at a time; that he some times stayed as long as five or six days. One Wittstein testified that he had charge of the Stationer's Department at the Cincinnati office of Globe-Wernicke Company; that he had been selling in Chicago for that company for about seven years and was in Chicago about the middle of January,

Vernon Keays had met him in Chicago about the 1st of January, that he had been selling in Chicago for that company for about three years; Detectives at the Criminal office of John-Carnicke Company; Mistretta testified that he had charge of the collector's books at the time stated as long as five or six days. (He was not in Chicago more than a day at a time; that he was out in Chicago office, not more than one-half an hour at a time and during that time (testified) at the Chicago office and took applications for a whole week at one time from Dinsmuir and made out the policies; that in 1917 the company ceased to do business in Chicago and not sell at wholesale to their Chicago buyer manager and ex Burgess, and that the same continued with the company under the name of Patrie Famous; that there are people connected with the company whose name was Ojetcho Brunon and has been with them for 20 years; that the present manager of the Alien-Pentrotz Company at the time was a Mr. Dinsmuir's report brides.

For the defendant, one Murphy testified that the Chicago office of the Company did not sell at wholesale to their Chicago buyer manager and ex Burgess, and that the same continued with the company under the name of Patrie Famous; that there are people connected with the company whose name was Ojetcho Brunon and has been with them for 20 years; that the present manager of the Alien-Pentrotz Company at the time was a Mr. Dinsmuir's report brides. We be two so-called wholesale bridge manufacturer's prison. We be two so-called wholesale bridge company have been Burglared them other manufacturers and at some registers, especially where it is known that the goods Burglaries made from others, some of whom were jewelers, and the report of an other firms to a manufacturer, in showing damages be broken which are claimed to have resulted from being increased through the period in question. Not can order, and in some instances it appearing that the prices firmly in excess of those involved in the alleged refused the alleged order, one the Burglaries being for machine

1917, staying five or six days and that he was not in Chicago again until June 17; that when he was in Chicago he was accustomed to call on the Stationer's trade to sell them his company's goods; that he knew the personnel of the Chicago office in February 1917 and that there was no one in that office whose name was similar to any of those mentioned by Morris Pancoe and that he was the only wholesale representative of the Globe-Wernicke Co. to cover the Chicago territory in 1917. From the testimony of this witness it appears that some of the prices relied upon by the plaintiff as Globe-Wernicke prices, were in fact, not the prices charged for the goods in question by that Company and it further appeared that some of the items included in the alleged telephone order, were not even manufactured by the Globe-Wernicke Company and were unknown to the witness. One Curtis of Burr-Vack Co., also testified as to the prices of Globe-Wernicke Co. to dealers in 1917, which were higher than those testified to by Pancoe. Blaine, the secretary and treasurer of the Globe-Wernicke Company, also testified that Wittstein was the only representative of that company covering Chicago, for wholesale orders, in 1917, and that in February of that year, their Chicago office had no one in its employ whose name was similar to any of those mentioned by Pancoe. His also testified that his company received no orders from the plaintiff between January 1, 1917, and July 30, 1918.

In our opinion, any finding based onthe fact that the plaintiff gave the order alleged, to the Globe-Wernicke Company, on February 10, 1917, and that such order was refused, is against the manifest weight of the evidence, and we are further of the opinion, that any finding that the plaintiff was

ther of the opinion, that any finding that the plaintiff was in contempt of the order of the 14th of March, 1917, or in contempt of the order of the 15th of January, 1917, was not justified by the evidence. We are unable to find that the plaintiff had violated the order of the 14th of March, 1917, but that such order was rescinded, on February 16, 1917, but that such order was reinstated, on January 1, 1917, was only on January 4, 1917.

In our opinion, any finding based upon that portion of the evidence which tended to show that the plaintiff was in contempt of the order of the 14th of March, 1917, by reason of the matters set forth in the affidavit, as we construe it, was not justified by the evidence. It also appears that no one in the employ whose name was similar to that of those mentioned by witness was in the employ of the Globe-Wernicke Company, on February 16, 1917, but that such order was reinstated, on January 1, 1917, was only on January 4, 1917.

In our opinion, any finding based upon that portion of the evidence which tended to show that the plaintiff was in contempt of the order of the 14th of March, 1917, by reason of the matters set forth in the affidavit, as we construe it, was not justified by the evidence. It also appears that no one in the employ whose name was similar to that of those mentioned by witness was in the employ of the Globe-Wernicke Company, on February 16, 1917, but that such order was reinstated, on January 1, 1917, was only on January 4, 1917.

damaged by the alleged acts of the defendants, complained of, is against the manifest weight of the evidence. The record abundantly shows, and indeed the plaintiff does not deny that from the time of its incorporation, down to the time of the trial, it did an ever increasing business. But, as stated before, the plaintiff's contention is that, had it not been for the acts of the defendants complained of, the increase in the volume of its business would have been even more rapid than it was. We find no evidence in the record to substantiate that contention, but, however, that may be, as already stated, the only evidence submitted, in proof of actual damage and the only evidence by which the plaintiff contends, in this court, that such damages were proven, was the evidence relating to the alleged telephone order of February 10, 1917, and the purchases claimed to have been made by the plaintiff because of the refusal of that order by the Globe-Wernicke Company. In our opinion, that evidence fails utterly to establish damages as claimed.

For the reasons we have pointed out, it is our opinion that, assuming the conspiracy to be established, as alleged, the plaintiff was not damaged thereby and therefore, the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the plaintiff was not damaged by the alleged conspiracy or by any acts of the defendants in furtherance thereof.

O'CONNOR, P.J. CONCURS,
TAYLOR, J. DISSENTING:

In view of the verdict of the jury, involv-

damaged by the alleged acts of the defendants, complained of, is against the manifest weight of the evidence. The record apparently shows, and indeed the plaintiff does not much later the time of the incorporation, down to the time of the trial, it did an ever increasing business. But, as stated before, the plaintiff's contention is that, had it not been for the acts of the defendants complained of, the increase in the volume of its business would have been even more rapid than it was. We find no evidence in the record to substantiate that contention, but, however, that may be, as already stated, the only evidence submitted, in proof of actual damage and the only evidence by which the plaintiff contends, in this court, that such damages were proven, was the evidence relating to the alleged telephone order of February 10, 1917, and the purchases claimed to have been made by the plaintiff because of the refusal of that order by the Diebe-Merrioke Company. In our opinion, that evidence fails utterly to establish damages as claimed.

For the reasons we have pointed out, it is our opinion that, assuming the correctness of the contention of the plaintiff-appellee, the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED & FINAL JUDGMENT.

FINDING OF FACT:

We find as a fact that the plaintiff are not

In view of the verdict of the jury, insuffi-

ing as it does, under the instructions of the court a determination that the plaintiff suffered actual damages by reason of the conspiracy and the acts of the defendants in furtherance thereof, I am of the opinion that the evidence on the subject of actual damages as it appears in the record does not warrant the conclusion that the judgment of the trial court is against the manifest weight of the evidence. It may be true that the testimony of Morris Pancoe, concerning the exact name of the representative of the Globe-Wernicke Co., is somewhat confusing, but, nevertheless, his testimony, taken altogether, as to the various details of the order given on February 10, 1917, is so definite and so strong and is so little controverted by the mere negatives of Murphy and Blaine, and his testimony as to the higher prices he had to pay is so certain, I am unable to agree with the majority opinion of the Court that the verdict of the jury, as far as it involves proof of actual damages, is against the manifest weight of the evidence.

natural damages, is against the manifest weight of the evidence.

I am unable to agree with the majority opinion of the Court that the verdict of the jury, be far as it involves proof of timony as to the highest price he had to pay is so certain, verted by the more moderate of Murphy and Hiatt, and die ter- 1917, is so definite and so strong and is so little contro- ns to the various details of the order given on February 10, counting. But, nevertheless, his testimony, taken altogether, the testimony of Morris Hudson, concerning the exact name of the representative of the Globe-Journals Co., in connection the amount weight of the evidence. It may be true that the conclusion that the judgment of the trial court is against of natural damages as it appears in the record does not warrant therefore I am of the opinion that the evidence on the subject the constitutional and the acts of the defendants in interference plaintiff suffered natural damages by reason of ing as it does, under the instructions of the court a determin-

34 - 26147

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

PAUL KELLY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error, the defendant, Kelly, seeks to reverse the judgment of the Municipal Court of Chicago, finding him guilty of being a vagrant, after verdict by a jury, and sentencing him to six months in the house of correction in Chicago.

Section 270 of the Criminal Code, (J.& A. par. 3962) defines several classes of persons who "shall be deemed to be and they are declared to be vagabonds." The complaint in the case at bar is based on that paragraph of the statute and it charges that the defendant (1) "was an idle and dissolute person"; (2) and that he "was habitually neglectful of his employment and calling and did not lawfully provide for himself"; (3) and that he "neglected all lawful business and did habitually misspend his time without giving a good account of himself"; (4) and that he "was known to be a pickpocket, having no lawful means of support and was habitually found prowling in and loitering around thorough-fares", all in violation of the section of the statute referred to.

For the prosecution, one Bryne, testified that he

34 - 26147

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

PAUL KELLY,
Plaintiff in Error.

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MUNICIPAL COURT
OF CHICAGO.

229 I.A. 641

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For the prosecution, one Byrne, testified that he

was a police officer and at the time he arrested the defendant he first saw him hanging on a street car holding the handle with his left hand and pushing a man named Moore ahead of him into the car; that the car slowed up and Moore backed out of the car and Kelly rode as far as the next corner and dropped off and came back; that Kelly ran for the next car that came along and got hold of the handle in the same position he was in on the previous car and Moore ran in and started to crowd his way into the car, whereupon, the witness arrested both the defendant and Moore. The witness further testified, over objection, that Moore was a pickpocket; that he asked the defendant where he was working and he said that he was working for a real estate man and upon being asked where the offices were he did not care to state and that upon being questioned further on the following day, he said he was not working and had not been for the previous seven months; that his last work was at Gary, Indiana, for a sewing machine company. Again, over objection, this witness was permitted to state that he had arrested the defendant in April, 1919, at which time "he was sent to Joliet for violation of his parol." On cross-examination, this witness stated that the occasion in question was the only one on which he had ever seen Moore and that he had not seen the defendant for 18 months previous to the time of this arrest. One O'Brien, also a police officer, testified that he talked with the defendant at the station and that the latter said he had not been working for the last seven months; that he asked the defendant who Moore was and he replied "that's the wire; but I am going to get rid of that bum." The witness explained that the expression "wire" meant a pickpocket, the "wire" being the man who puts his fingers in the victims' pockets.

the man who [illegible] the stirring, [illegible]
that the exclamation "alive" meant a blackmarket, the "alive" being
but I am doing so for its of that now." [illegible] examines
the defendant who looks ace and he is [illegible] the alive;
had not been working for the last seven months; that he making
with the defendant at the station was that one Walter said he
One O'Brien. also a fellow officer, testifying that he retired
defendant for 18 months previous to the time of this arrest.
on which he had ever been docile and that he has not been the
witness stating that the counsel in connection was the only one
Police for visitation of his parol." Cr cross-examination, this
the defendant in April, 1919, at which time "he was next to
tion, that attempt was permitted to state that he two arrested
Daly, Indiana, for a warning warrant complaint. Again, over objec-
been for the first an Asian murder; that his last work was at
the following day, he said he was not working but had not
ment case is minor but that when being questioned further on
where he was working" and he told that he was working for a real
estate man and upon being asked where the officer were he did
ment and Sears [illegible]. The witness further testified, over objec-
tion, that Moore was a bicyclecar; that he asked the defendant
my into the car, who object, the witness attorned with the de-
on the previous car and Sears ran in and started to crowd his
rings and got hold of the bundle in the same position he was in
off and came back; that Kelly ran for the next car that came
the car and Kelly rode me far as the next corner and stopped
into the car; that the car plowed up and Moore backed out of
with his left hand and waiting a man named Moore ahead of him
mut he first saw him backing on a street car holding the bundle
was a police officer and at the time he arrested the defend-

The only witness for the defense was one Kenny, who described himself as Business Managing Salesman for the Singer Sewing Machine Company. He testified that he had known the defendant for two years and that he had worked for a brother-in-law of the witness at different times; that for about three months previous to the date of arrest the defendant had been working forthe witness on a salary of $15.00 a week and commissions; that this work was not steady; that the defendant made himself generally useful around the store, cleaning machines and getting them ready to go out and did certain work of canvassing and locating people who had purchased machines on time and had become delinquent in their accounts and moved. This witness gave several names of people which had been given to the defendant for investigation and also mentioned one or two personsby name and gave their addresses, to whom the defendant had made sales on commission.

In support of the appeal the defendant contends that the information does not charge any offense under the Vagabond Act and also that the evidence does not sustain any of the charges contained in the information. The first and third charges in the information are clearly insufficient. Among others declared by the statute to be vagabonds are "all persons who are idle and dissolute and <u>who go about begging</u>" and also "all persons who are idle or dissolute and who neglect all lawful business and who habitually mis-spend their time by frequenting houses of ill-fame, gaming houses or tippling shops." The first and third charges in thecomplaint omit portions of those clauses in the statute which are material and without which no crime is charged.

The second clause in the complaint, to the effect that

The only witness for the defense was one Kenny, who testified himself to Brisbane Investing Syndicate for the higher selling committee formerly. He testified that he had known the defendant for two years and that he had worked for a brother-in-law of the witness at different times; that for about three months previous to the date of arrest the defendant had been working for the witness on a salary of $15.00 a week and commissions; that this work was not steady; that the defendant made himself generally useful around the store, cleaning out cellar and getting them ready to go out and in certain work of canvassing and locating people who had purchased machines on time and had become delinquent in their payments and moved. This witness gave several names of people which had been given to the defendant for investigation and also mentioned one or two persons by name and gave their addresses, to whom the defendant had made sales on commission.

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the defendant was habitually neglectful of his employment and calling and did not lawfully provide for himself, while not in the language of the statute, is sufficiently so to make it a valid charge of an offense. In our opinion the evidence in the record falls far short of being convincing beyond a reasonable doubt, that the defendant was guilty of this charge.

The fourth charge inthe information was not in the language of the statute which says, among others who shall be deemed to be pickpockets, shall be included "all persons who are known to be * * * pickpockets, whether by their own confession or otherwise, * * * and having no lawful means of support, are habitually found prowling around * * * crowded thoroughfares, cars or omnibuses". If we consider the fourth charge in the complaint to be sufficient under that part of the statute, the question remains as to whether the proof was sufficient to sustain it. In our opinion it was not. It must be kept in mind that to convict one of this charge it must be shown that the defendant had no lawful means of support and that he was habitually found prowling around a crowded thoroughfare or car as the case may be. We are very strongly inclined to believe from the evidence that on the occasion in question the defendant and Moore were attempting to pick pockets. But, as our Supreme Court pointed out in the recent case of The People v. Klein, 292 Ill. 420, "A pickpocket is not necessarily a vagabond under the provisions of the statute." Further, the evidence does not show beyond a reasonable doubt that the defendant was without lawful means of support. It indicates rather, the contrary.

It was not strange that the jury found the defend-

the defendant was materially prejudiced at his examination

ple do it, that the defendant was fully at this change.

a fatal defect for want of point constituting perjury a reason-

able ground for a plea. In one opinion the evidence in

not in the judgment at the change. It additionally on to make it

one fortune and did not lawfully provide for himself, while

The following cases illustrate the application of the

Illinois. Upon its, the indictment in not materially a state-

ment charging that in the present term of the [illegible] a

certain day named stamped to him document. But, as that

fact was given legal meaning by the document. It indicates

clear to a man that charged a reasonable person of

bond under the circumstances of the document. Finally, the evi-

dence in the case at bar. It is material.

It was not alleged that the false [illegible] the circum-

ant guilty, after the trial court had permitted (over objection) a police officer to show by his testimony that the defendant had been previously convicted of some crime and was sentenced to Joliet and that after his release he had been arrested and returned to Joliet for violation of his parol, and also in view of the fact that in the course of the oral instructions to the jury, the trial court stated that the fact that the defendant had not taken the stand should not, in and of itself, be taken against him, "but with all the other facts and circumstances you may consider that omission to take the stand," and in view of the court's further instruction to the effect that "if the evidence is that he has been unemployed for the last seven months prior to his arrest, that, under our law, makes him a vagrant, a vagabond."

For the reasons stated, the judgment of the Municipal Court is reversed.

REVERSED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

not guilty, after the trial court had permitted (over objection) a police officer to show by his testimony that the defendant had been previously convicted of some crime and was sentenced to Joliet and that after his release he had been arrested and returned to Joliet for violation of his parol, and also in view of the fact that in the course of the oral instructions to the jury, the trial court stated that the fact that the defendant had not taken the stand should not, in and of itself, be taken against him, "but with all the other facts and circumstances you may consider that omission to take the stand," and in view of the court's further instruction to the effect that "if the evidence is that he has been unemployed for the last seven months prior to his arrest, that, under our law, makes him a vagrant, a vagabond."

For the reasons stated, the judgment of the Municipal Court is reversed.

REVERSED.

O'CONNOR, P.J. AND TAYLOR, J., CONCUR.

65 - 26188

CORA S. CROSS,

Appellee,

v.

HELEN SCHMIDT and MARIE SCHMIDT,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

223 I.A. 642

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a decree of foreclosure entered in the Superior Court of Cook County, following defaults in certain payments on a principal note of $500.00 executed by the defendant Helen Schmidt, secured by her trust deed conveying certain real property. The answer of the defendants, filed to the complainant's bill of complaint, alleged in substance that the note in question was invalid, as it had been given without consideration and its execution had been procured by duress. The cause was referred to a Master who fully reported the facts found from the evidence together with his findings that there was consideration for the note and that its execution had not been procured by duress and his recommendation that a decree be entered as prayed for. Objections and exceptions to the Master's report were overruled and the decree appealed from was entered as recommended.

The Master found the facts to be as follows: One Sidney Schmidt was a stockholder in The Union Contracting

COOK S. CROSS,

Appellee,

v.

APPEAL FROM

SUPERIOR COURT,

NORMAN SCHMIDT and MARIE SCHMIDT,

COOK COUNTY.

Appellants.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a decree of foreclosure entered in the Superior Court of Cook County, following default in certain payments on a principal note of $4,000.00 executed by the defendant Helen Schmidt, payable to the order of the plaintiff, and secured by a trust deed conveying certain real property. The owner of the defendants, filed to the complainant's bill of complaint, alleged in substance that the note in question was invalid, as it had been given without consideration and its execution had been procured by duress. The cause was referred to a Master who fully reported the facts found from the evidence together with his findings that there was ground relation for the note in that its execution had not been procured by duress and his recommendation that a decree be entered as prayed for. Objections and exceptions to the Master's report were overruled and the decree appealed from was entered as recommended.

The Master found the facts to be as follows: the Sydney Schmidt was a stockholder in the Union Contracting

Company, holding 18 of the 100 shares which made up its capital stock. Of the other shares, 30 remained in the treasury of the company. The affairs of the company were such that it needed more capital. The company was engaged in building factory buildings. Schmidt personally, was engaged in building and selling small flat buildings. He wished the Company to extend its operations and engage in the construction of residences and flat buildings. He expected to be able to give the Company contracts for such buildings to be erected for him, thus increasing the earnings of his stock and enabling him to make profits on the resale of the buildings.

Schmidt had known the complainant, Cora S. Gross, for many years and at various times prior to her marriage, she had sought his advice in business matters. Early in 1915 he told complainant and her husband of the Union Contracting Company and recommended the purchase of its stock as a good investment. Complainant's husband did not think well of it, but, unknown to him, complainant used $3,000 of her funds in purchasing the 30 shares of the stock which had been in the Company's treasury. During the first year thereafter complainant received dividends aggregating 7 per cent on this stock but following this the company got into difficulties and was obliged to liquidate. Its debts exceeded its assets and the liquidation yielded nothing for the stockholders. Complainant requested Schmidt to either have the Company repurchase her stock or assume the responsibility for it himself, inasmuch as he had induced her to make the investment. He agreed to assume liability to her for the $3,000 and pursuant to this agreement he and

to her for the $3,000 and promised to give adequate us and her to make the investment. He agreed to assume liability responsibility for it himself, inasmuch as he had induced either Dave the Company reimburse her stock or exercise its stock for the stockholders. Complainant reasserted request to exercise the option and the liquidation yielded nothing into difficulties and was obliged to liquidate. Its debts per cent on this stock but following this the company for thereafter complainant received dividends amounting ? had been in the Company's treasury. During the first year of her funds in purchasing the 3c shares of the stock which well of it, but, unknown to him, complainant used $3,000 as a good investment. Complainant's counsel did not think trusting Company and recommended the purchase of the stock 1915 he told complainant and her husband of the Union Con- she had sought his advice in business matters. Early in for many years and at various times prior to her marriage, real of the buildings.

Gabrielt had known the complainant, Cora J. Grove, ings of his stock and enabling him to make profits on the buildings to be erected for him, thus increasing the anticipated to be able to give the Company contracts for such the construction of residences and flat buildings. He wished the Company to extend its operations and engage in engaged in building and selling small flat buildings. He in building factory buildings. Gabrielt personally, was such that it needed more capital. The company was engaged capital stock. Of the other shares, 30 remained in the treasury of the company. The efforts of the company were Company, holding 18 of the 100 shares which made up its

his wife executed two mortgages, securing his two notes for $1,000 each, conveying certain property referred to in the record as the Drake avenue property. Although title to this property was in Schmidt, it belonged to his mother and these mortgages were executed and delivered without her knowledge. They were third mortgages but complainant accepted them thinking they were first liens. Complainant did not turn back her stock at this time.

Some time later, complainant's husband learned of the investment she had made and of its unfavorable outcome and he had several talks with Schmidt in which he took the position that it was incumbent on the latter to protect his wife from any loss. As a result, Schmidt gave two notes, one for $3,000 representing the original investment and the other for $150 representing interest up to that time. It appears from the record that complainant continued to hold the two previous notes for $1,000 each and the mortgages on the Drake avenue property, apparently as security for the payment of Schmidt's notes for $3,000 and $150. Later Schmidt delivered to complainant's husband what purported to be a warranty deed conveying certain property, signed by one Spillman and wife. This deed contained a notation on its face to the effect that the property therein referred to was being conveyed as security for Schmidt's two notes of $3,000 and $150.00. The property purported to be conveyed by this deed did not exist and the signatures to it were fictitious. This fact was discovered by complainant's husband when he attempted to have the deed recorded and when he advised Schmidt of his discovery, the latter requested him not to institute any criminal proceedings but to give

him an opportunity to realize on certain building ventures, Schmidt promising, as soon as these matured, to pay his notes. Complainant's husband did not say what he would do.

The prior incumbrances on the Drake avenue property came due and the holders refused to extend. One Krejci, representing them , notified the defendant Marie S. Schmidt, Sidney Schmidt's mother, that the notes secured by these incumbrances would have to be paid. He also discussed with her and with her daughter, Helen Schmidt, the other defendant, the situation involving Sidney Schmidt and the complainant, Complainant's husband refused to have anything more to do with Schmidt and the latter requested Krejci to attempt to effect a settlement between him and complainant and her husband. Subsequently a settlement was reached whereby Schmidt caused his sister Helen Schmidt to execute her two notes for $500.00 each and two trust deeds and assignments of rents securing them. It is one of these notes with the trust deed and assignment of rents securing the same that is involved in the suit at bar. The other of the two notes, with the trust deed and assignment of rents securing that note is involved in a similar suit, being Case No. 26189 in this court, a decision in which is also being rendered this day. Under the terms of this settlement, Schmidt also caused the equity in the Drake avenue property to be conveyed to complainant, and complainant returned to Schmidt the stock she had purchased in the Union Contracting Company, the fictitious warranty deed and the third mortgage notes on the Drake avenue property. The stock in question was returned to the Union Contracting Company. The testimony indicates that Schmidt's two notes for $3,000 and $150.00 were also

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returned to him but it is not clear from the record when that was done.

The Master further found that in one or more of the conversations with Schmidt, Krejci said, in substance, that unless he made some settlement with the complainant, her husband would cause him to be prosecuted but that it had not been shown, by a preponderance of the evidence, that either complainant or her husband had authorized such statements. It was further found that the defendant, Helen Schmidt, had acquired title to the mortgaged property from one Anna K. Stock (her aunt) at the same time she had executed the trust deed being foreclosed in the suit at bar, and that she stated to Krejci, she had taken title for her brother; also that Helen Schmidt later conveyed the property to her mother, the defendant Marie S. Schmidt.

The Master further found that the conveyance of the equity in the Drake avenue property was in part payment of the $3,000 which Schmidt undertook to pay complainant and that this, together with the two notes for $500 and the trust deeds securing the same, which complainant seeks to foreclose in the suit at bar, and case No. 26189 above referred to, were accepted by her in full settlement of her claim against Sidney Schmidt.

It was further found by the Master that, while the defendant Helen Schmidt received no financial consideration for the execution of the note and trust deed here involved, she executed and delivered them to enable her brother to make his settlement with the complainant and procure the return of the fictitious deed and carry out his promise to make good

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The Master further found that the conveyance of the equity in the Drake Avenue property was in part payment of the $3,000 which Schmidt undertook to pay complainant and that this, together with the two notes for $500 and the trust deeds securing the same, which complainant seeks to foreclose in the suit at bar, and case No. 36180 above referred to, were accepted by her in full settlement of her claim against Sidney Schmidt.

It was further found by the Master that, while the defendant Helen Schmidt received no financial consideration for the execution of the note and trust deed here involved, she executed and delivered them to enable her brother to make his settlement with the complainant and procure the return of the fictitious deed and carry out his promise to make good

the loss which complainant had sustained through the stock investment she had been induced to make by her brother, by which he had expected to benefit, both in his individual business and as a stockholder in the company. It was the conclusion of the Master that there was consideration for the note here in suit and also that it had not been executed because of duress, as claimed by the defendants.

Insupport of this appeal the defendants contend (1) that Sidney Schmidt was under no legal liability to complainant by reason of the investment she made and its unfortunate outcome and that his promise to make good her loss was consequently nudum pactum; (2) that the various notes he gave here were without consideration and that in so far as the return of those notes to Sidney Schmidt furnished the reason for the execution and delivery of the note and trust deed here involved, the latter were also without consideration; and further, (3) that in so far as the return of the fictitious deed furnished a consideration for the execution and delivery of the note and trust deed here involved, the latter was based on a consideration which was against public policy and illegal and therefore void, and (4) that the note and trust deed in question were executed as the result of duress.

In our opinion there was ample consideration for the original undertaking of Sidney Schmidt to save Mrs. Gross harmless from any loss by reason of her investment and also for the various notes he gave her and her husband in view of their position that he, having induced her to make the investment, was obliged to reimburse her. It is not necessary to determine whether Mrs. Gross had such a claim against Sidney Schmidt as would have enabled her to recover against him in a suit at law.

the loss which complainant had sustained through the stock investment she had been induced to make by her brother, by which he had expected to benefit, both in his individual business and as a stockholder in the company. It was the contention of the Master that there was consideration for the note here in suit and also that it had not been executed because of duress, as claimed by the defendants.

Inasupport of this appeal the defendants contend (1) that Sidney Schmidt was under no legal liability to compliment by reason of the investment who made and its material outcome and that his promise to make good her loss was unenforceable; (2) that the various notes be here considered as a single transaction; and further, (3) that in so far as the return of the fictitious deed formed a consideration for the execution and delivery of the note and trust deed here involved, the latter was based on a consideration which was against public policy and illegal and therefore void, and (4) that the note and trust deed in question were executed as the result of duress.

In our opinion there was ample consideration for the original undertaking of Sidney Schmidt to save Mrs. Gross harmless from any loss by reason of her investment and also for the various notes he gave her and her husband in view of their position that he, having induced her to make the investment, was obliged to reimburse her. It is not necessary to determine whether Mrs. Gross had such a claim against Sidney Schmidt as would have enabled her to recover against him in a suit at law.

It is conclusively shown by the record that both she and her husband were acting in good faith in pressing her claim, and that in an effort to settle the matter, Sidney Schmidt made his original promise and gave his various notes. His promise was made and his notes were given without any fraud on the part of the complainant of her husband, actual or constructive and the agreements thus entered into by him were fairly entered into. It follows that his original promise was made and his notes were given for a sufficient consideration. McKinley v. Watkins, 13 Ill. 140; Honeyman v. Jarvis, 79 Ill. 318; Adams v. Crown Coal and Tow Co., 198 Ill. 445; Walker v. Shepherd, 210 Ill. 100. Furthermore, in part at least, the consideration for the $500 note and the trust deed here sought to be foreclosed, which were executed and delivered by the defendant Helen Schmidt, was the return to her brother of the various notes and securities he had given the complainant and her husband. Even if her brother's notes had been given without consideration the return of them by the parties to whom he had given them, would furnish ample consideration for the execution and delivery of the note and trust deed involved in the suit at bar, for reasons which are apparent and upon which we need not elaborate.

We are further of the opinion that the fact that part of the consideration for the execution and delivery of the note and trust deed hereinvolved, was the return to Sidney Schmidt, by the complainant and her husband, of the fictitious warranty deed which he had given them, in no way vitiates the transaction. It does not appear from any testimony in the record that either the complainant or her husband, at any time, agreed not to institute criminal proceedings against Sidney Schmidt, if the

note and trust deed here involved were executed. Sidney Schmidt himself testifies that when he asked Dr. Gross not to prosecute him criminally, but give him an opportunity to work out some of his business deals and pay the amount he had promised to pay, Dr. Gross, would not say what he would do about that, one way or the other. It also appears that at the time the note and trust deed here involved and also the note and trust deed involved in case No. 26189 were turned over to the complainant, and Schmidt received back his notes and his fictitious warranty deed, the complainant's husband retained a photographic copy of that deed which he had made.

As to the final point urged, it is our opinion that the record fails to show that the note and trust deed upon which the suit at bar is based, was executed under duress. Although denied by Sidney Schmidt, the Master was warranted, by the other evidence, in finding that Krejci was the representative of Sidney Schmidt in the negotiations concerned in the settlement with the complainant and her husband. It appears from the evidence that Krejci told both the defendants, at least on one occasion, that unless some satisfactory settlement was made with Dr. Gross, and his wife, Sidney would go to jail, but it also appears from the record that neither the complainant nor her husband ever made such a statement either to Sidney Schmidt or the defendants or to Krejci, or authorized Krejci to make that statement to the defendants. Krejci took the note and trust deed involved in the suit at bar, to the place of residence of the defendants and left them there. The defendants seem to have talked the situation over with Sidney Schmidt. Later the defendant, Helen Schmidt, executed the papers and they were returned to Krejci and ultimately delivered to the

note and trust deed here involved were executed. Sidney Schmidt himself testified that when he asked Dr. Green not to prosecute him criminally, but give him an opportunity to work out some of his business debts and pay the amount he had promised to pay, Dr. Green would not say what he would do about that, one way or the other. It also appears that at the time the note and trust deed here involved and also the note and trust deed involved in case No. 26182 were turned over to the complainant, and Schmidt received back his notes and his flotations warranty deed, the complainant's husband retained a photographic copy of that deed which he had made.

As to the final point urged, it is our opinion that the record fails to show that the note and trust deed upon which the suit at bar is based, was executed under duress. Although denied by Sidney Schmidt, the matter was warranted, by the other evidence, in finding that Krejci was the representative of Sidney Schmidt in the negotiations concerned in the settlement with the complainant and her husband. It appears from the evidence that Krejci told both the defendants, at least on one occasion, that unless some satisfactory settlement was made with Dr. Green, and his wife, Sidney would go to jail, but it also appears from the record that neither the complainant nor husband ever made such a statement either to Sidney Schmidt or the defendants or to Krejci, or authorized Krejci to make that statement to the defendants. Krejci took the note and trust deed involved in the suit at bar, to the place of residence of the defendants and left them there. The defendants seem to have taken the situation over with Sidney Schmidt. Later the defendant, Helen Schmidt, executed the papers and they were returned to Krejci and ultimately delivered to the

complainant. The documents in question were executed by the defendant, Helen Schmidt, after due deliberation and apparently after she had talked the situation over with her mother and her brother and under such circumstances, even though Krejci had previously made the statements referred to, it cannot be said that the execution of the note and deed were brought about by duress. Rendleman v. Rendleman, 156 Ill. 568.

We find no error in the record and therefore the decree of the Superior Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J.,CONCUR.

complainant. The documents in question were executed by the defendant, Helen Schmidt, after due deliberation and apparently after she had talked the situation over with her mother and her brother and under such circumstances, even though Kriplet had previously made the statements referred to, it cannot be said that the execution of the note and deed were brought about by duress. Bendiksen v. Bendiksen, 156 Ill. 658.

We find no error in the record and therefore the decree of the Superior Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TUOHY, J. CONCUR.

66 - 26189

CORA S. GROSS,

Appellee,

v.

HELEN SCHMIDT and MARIE S. SCHMIDT,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

223 I.A. 642

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a bill to foreclose a trust deed executed by the defendant Helen Schmidt to secure her note for $500. The suit at bar involves the same facts and the same questions of law as are presented in case #26188 in this court in which an opinion is this day being filed. The two suits are alike in all respects. We will, therefore, not repeat here what we have had occasion to say in the opinion filed in case #26188, but for the reasons there set forth, the decree of the Superior Court, appealed from in the suit at bar, is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

66 - 3d1s3

DORA S. CHOEN,

Appellee,

APPEAL FROM

V.

MULTNOMAH COUNTY,

DOCK COUNTY.

HENRY SCHMIDT and MARIE
C. SCHMIDT,

Appellants.

MR. JUSTICE TENNEYSON delivered the opinion of

the court.

This was a bill to foreclose a trust deed executed by the defendant Union Mutual to secure two notes for $800. The suit of Dr. involves the same facts and the same questions of law as are presented in case 12252 in this court in which an opinion in this day being filed. The two suits are alike in all respects. We will, therefore, not repeat here what we have had to state in the opinion filed in case 12252, but for the reasons there set forth, the decree of the Superior Court, appealed from in the suit at bar, is affirmed.

AFFIRMED.

O'CONNOR, J.T. [illegible], J. [illegible].

98 - 26264

ARTHUR LANGNER,

Appellant,

v.

CHARLES KEESHIN,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

223 I.A. 642 3

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the plaintiff seeks to reverse an order entered in the Municipal Court of Chicago vacating a default and judgment which he had previously procured against the defendant in the sum of $119.05.

The defendant was defaulted and judgment was entered in favor of the plaintiff on December 29, 1919. On January 9, 1920, a motion was made in behalf of the defendant, that the default and judgment entered against him be vacated and set aside and on January 12, 1920 that motion was overruled. On February 13, 1920, the defendant filed a petition under Section 21 of the Municipal Court Act, in a further effort to have the default entered against him on December 29, 1919, vacated. On February 16, 1920, that petition was denied. On February 24, 1920, the defendant made a motion asking that the order of the court entered on February 16, 1920, be vacated and set aside and that his petition seeking to vacate the original judgment of December 29, 1919, be allowed. The defendant's last motion was allowed and the order of February 16, 1920 was vacated as was also the original judgment of December 29, 1919. From this order of the Municipal Court, entered on February 24, 1920,

CA - 10864

ASHTON PATTERSON,

Appellant,

v.

CHARLENE KENNEDY,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Mr. Justice [illegible] delivered the opinion of the court.

By this appeal the plaintiff seeks to reverse an order entered in the Municipal Court of Chicago vacating a default and judgment which he had previously procured against the defendant in the sum of $310.00.

The statement was submitted and judgment was entered in favor of [illegible] on December 26, 1919. On January 9, 1920, a motion was made in behalf of the defendant, that the default and judgment entered against him be vacated and set aside and on January 19, 1920, that motion was overruled. On February 19, 1920, the defendant filed a petition under Sec. 21 of the Municipal Court Act, i.e., further effort to have the default entered against him on December 20, 1919, vacated. On December 16, 1920, that petition was denied. On February 26, 1920, the defendant made a motion asking that the order of the court entered on February 16, 1920, be vacated and that the order of December 29, 1919, be vitiated. The defendant's last motion and petition recited to vacate the original judgment of December 29, 1919, be vitiated. The defendant's last motion was filed and the order of February 19, 1920 was received on [illegible] 23, 1920. [illegible]

the plaintiff has perfected this appeal.

In our opinion the trial court erred in entering the order appealed from. It is only where the defendant has made no motion to vacate, set aside or modify a judgment, within thirty days after the entry of such judgment, that the Municipal Court has jurisdiction to entertain a petition alleging grounds for vacating the judgment which would be sufficient to cause the same to be vacated by a bill in equity. Municipal Court Act, Sec. 21 Ill. Sts. (J.&A.) par. 3333. Flora v. Fields, 156 Ill. App. 341.

The order appealed from is therefore reversed and the cause is remanded to the Municipal Court of Chicago with directions to expunge the order of February 24, 1926, from the record; Price v. Marie, 207 Ill. App. 112.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

the plaintiff has declared this appeal.

In our opinion the point would arise in entering the order appealed from. It is only where the defendant has made no motion to vacate, set aside or modify a judgment, within *thirty* days after the entry of such judgment, that the Municipal Court has jurisdiction to entertain a petition alleging that grounds for vacating the judgment would be sufficient to cause the same to be vacated by a Writ in equity. Municipal Court Act, Sec. XI Xii. Ocn. (1.94.) par. 2332. Vieira v. Florida. 180 Xii. App. 241.

The order complained from is therefore reversed and the cause remanded to the Municipal Court of Chicago with directions to vacate the order of February 24, 1931, from the record; Price v. Curtis. 24 Xi. App. 219.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J. Mc[illegible], J. Concur.

472 - 26646

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel Margaret Madden,

Appellee,

v.

FRANCIS FOLKEN,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 642

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a bastardy proceeding instituted by the relatrix, Margaret Madden, against the defendant, Francis Folken, inthe Municipal Court of Chicago. The defendant duly appeared, entered a plea of not guilty, waived his right to a trial of the issues by a jury and the issues were submitted to the court. After a hearing the court found the defendant guilty and entered judgment, finding that the defendant was the father of the bastard child of the relatrix and ordering the defendant to pay $1,100 in manner and form as provided by the statute, for the support of said child.

The defendant prayed an appeal from the judgment, to this court, which was allowed. His appeal bond in the sum of $2,000 was duly filed and approved.

A complete record was filed in this court by the defendant, and although a number of orders have been entered allowing the defendant additional time to file his abstract and brief, these documents have never been filed.

No error in the record has therefore been brought to the attention of this court and no reason has been pointed

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS.

APPELLATE DECK

THOMAS BOLKEN,

v.

Appellee,

Appellant.

MR. JUSTICE THOMSEN delivered the opinion of the court.

This is a mandamus proceeding instituted by the relator, Nathaniel Madden, against the defendant, Thomas Bolken, in the Municipal Court of Chicago. The defendant duly honored, entered a plea of not guilty, waived his right to a trial of the issues by a jury and the issues were submitted to the court. After a hearing the court found the defendant guilty and entered judgment, finding that the defendant was the father of the bastard child of the relatrix and ordering the defendant to pay $1.00 in manner and form as provided by the statute, for the support of said child.

The defendant brings on his writ of error the judgment of $2.00 was duly filed and appealed. His counsel says in this court, which was allowed. His counsel says in the argument.

A complete record was filed in this court by the defendant, and although a number of errors have been assigned and tried, there do not appear to be any that have been argued.

No error in the record has been brought to our attention by the

out to us for a reversal or modification of the judgment of the Municipal Court, in this case, and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

out to us for a reversal or modification of the judgment of the Municipal Court. In this case, and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

390 - 26564

J. NORMAN JENSEN, Appellant,

vs.

WILLIAM SEYMOUR, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 27, 1919, defendant purchased of plaintiff at Chicago a steel water tank and tower then standing at Port Arthur, Texas, and having a capacity of 100,000 gallons. The sale price was $700, and defendant paid $200 in cash and executed and delivered his promissory note for $500, payable to plaintiff's order, dated October 27, 1919, and due two months thereafter. Defendant agreed to take down and remove the tank and tower. On April 3, 1920, the note not having been paid, plaintiff sued defendant in the Municipal Court of Chicago, claiming the amount of the note and interest thereon at the rate of 5% per annum from December 27, 1919. In his affidavit of merits defendant set up as a defense, in substance, that plaintiff represented that the tank and tower could be taken down, shipped to any desired destination, there re-erected, and used as a storage tank for water, that the tower was capable of supporting the tank when filled with water, and that the plates of the tank were 5/16ths of an inch thick and capable of being recalked and were not pitted; that defendant relied upon said representations and executed and delivered the note in part consideration of the sale price; that plaintiff deceived and defrauded defendant in this, that the tank and tower could not be taken down, shipped and re-erected and used as a storage tank, that the tower was not capable of supporting the tank when filled with water, that the plates of the tank were not 5/16ths of an inch in thickness

360 - 26884

J. MORGAN DAVIES,

Appellant,

vs.

WILLIAM SAYMOUR,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE ONIMLEY DELIVERED THE OPINION OF THE COURT.

On October 27, 1916, defendant purchased of plaintiff at Chicago a steel water tank and tower then standing at Fort Arthur, Texas, and having a capacity of 100,000 gallons. The sale price was $700, and defendant paid $200 in cash and executed and delivered his promissory note for $500, payable to plaintiff's order, dated October 27, 1916, and due two months thereafter. Defendant agreed to take down and remove the tank and tower. On April 3, 1917, the note not having been paid, plaintiff sued defendant in the Municipal Court of Chicago, claiming the amount of the note and interest thereon at the rate of 5% per annum from December 27, 1916. In his affidavit of merits defendant set up as a defense, in substance, that plaintiff represented that the tank and tower could be taken down, shipped to any desired destination, there re-erected, and used as a storage tank for water, that the tower was a capacity of supporting the tank when filled with water, and that the action of the tank were 3/16ths of an inch thick and capable of being received and were not plates; that defendant relied upon said representation and executed and delivered the note in part consideration of the sale price; that plaintiff received and dismantled defendant in this, that the tank and tower could not be taken down, shipped and re-erected and used as a storage tank, that the tower was not capable of supporting the tank when filled with water, that

or capable of being recalked, but were full of pits, and the tank was so badly corroded, rusted and worn out that, when defendant attempted with all reasonable care to take the tank down, it broke, and that at the time plaintiff made said representations the said tank was worthless and unfit for any purpose or use other than to be junked, all of which facts were well known to plaintiff at the time and were unknown to defendant; and that by reason of the foregoing the consideration for the execution of the note has failed, etc. The cause was tried before the court without a jury, resulting in the court finding the issues against plaintiff, and on June 3, 1920, judgment was entered against him for costs. By this appeal plaintiff seeks to reverse the judgment and asks for judgment here against defendant for the amount of the note and accrued interest.

Plaintiff had been a civil engineer and had specialized in building construction for many years, but he had never bought or sold any second hand steel tanks or towers, of which facts defendant was informed. Plaintiff at one time had been employed by the City of Chicago as an architect in its building department, and defendant, who for more than 15 years had been a dealer in second-hand machinery and construction equipment and had taken down and re-erected second hand tanks, there became acquainted with him, and, after plaintiff ceased working for the City, had employed him as architect and engineer on two occasions. On September 10, 1919, plaintiff entered into a contract with the City of Port Arthur, Texas, wherein he agreed to dismantle and remove within 60 days the tank and tower and to pay the City before beginning the work of dismantling the sum of $425. During the month of September plaintiff informed defendant at Chicago that he had purchased the tank and tower and was soon going to Texas to inspect it, which he thereafter did, and on October 3,

or capable of being recaimed, but were full of pits, and the tank was so badly corroded, rusty and worn out that, when defendant attempted with all reasonable care to take the tank down, it broke, and that at the time plaintiff made said representations the said tank was worthless and unfit for any purpose or use other than to be junked, six of which facts were well known to plaintiff at the time and were unknown to defendant; and that by reason of the foregoing the consideration for the execution of the note was failed, etc. The cause was tried before the court without a jury, resulting in the court finding the issues against plaintiff, and on June 9, 1922, judgment was entered against him for costs. By this appeal plaintiff seeks to reverse the judgment and asks for judgment here against defendant for the amount of the note and accrued interest.

Plaintiff had been a city engineer and had specialized in building construction for many years, but he had never bought or sold any second hand steel tanks or towers, of which Ferris' defendant was informed. Plaintiff, who like them had been employed by the City of Elreno to [illegible] the building department, and [illegible] more than 12 years had been a duly a- to second-hand machinery and contract [illegible] engineer and had taken down and re-erected [illegible] tanks. Upon [illegible] the city, had with him, and, after plaintiff ceased working for the city, had employed him as [illegible] and engineer on the [illegible]. In September 10, 1919, plaintiff entered into a contract with the City of Fort [illegible], whereby he agreed to [illegible] and remove within 15 days the tank and tower to buy the [illegible] bought the work of [illegible] the same of 1919. During the month of September Plaintiff informed defendant at Elreno that he had purchased the tank and tower, and was [illegible] to inspect it, which he thereafter did, and on October 4,

1919, at Port Arthur he paid the City the sum of $425. After his return to Chicago defendant had several interviews with him relative to defendant assuming his contract with the city and purchasing from him said tank and tower, and defendant claims plaintiff then made the alleged false representations upon which he (defendant) relied. Subsequently, however, defendant communicated with a man named Dismukes, at Port Arthur, requesting that he inspect the tank and tower and make a report as to their condition, and on October 17, 1919, defendant received a telegram from Dismukes, as follows: "Tank in good condition except top ring, which has few pitts; top no good; balcony cannot be used; first 25 ft. section of tower good shape; balance is fair; ladder no good; four truss beams bad shape; pipe to tank good shape; guy rods and brace rods good shape." On October 27, 1919, defendant decided to purchase the tank and tower, made the cash payment and gave plaintiff the note sued upon and received from plaintiff a written assignment of all of plaintiff's title and interest in his contract with the City and in the tank and tower. About this time, or later, defendant arranged with the Connecticut Metal & Chemical Co. to sell to it and to re-erect the tank and tower at New Britain, Connecticut, at a price of $5,700, erected, and in December, 1919, defendant sent Frank Burke, a Chicago structural iron worker in his employ, to Port Arthur, to dismantle and take down the tank and tower. After working on the job for several weeks and after dismantling the roof and two or three rings of the tank Burke abandoned the job and returned to Chicago, and defendant did not thereafter further dismantle the tank and tower. Burke's testimony was to the effect that he found the roof in bad shape - the majority of the sheets being "beaded, rotted through;" that the tank had been built in sections or sheets, one overlapping the other and that he

1919, at York Arthur be paid the City the sum of $4238. After-
ble return to Chicago defendant had several interviews with
him relative to defendant assuming his contract with the city
and purchasing from him said tank and tower, and defendant
claims plaintiff then made the alleged false representations
upon which he (defendant) relied. Subsequently, however,
defendant communicated with a man named Simpkins, at York
Arthur, requesting that he inspect the tank and tower and
make a report as to their condition, and on October 17, 1919,
defendant received a telegram from Simpkins, as follows: "Tank
in good construction except top rim, which has few plates; top
no good; balcony cannot be used; rivet 6 ft. section of tower
good shape; bracing in fair; ladder no good; four truss beams
bad shape; pipe to tank good shape; dry rock and brace rods
good shape." In October of, 1919, defendant decided to pur-
chase this tank and tower, made the cash payment and gave plain-
tiff the note sued upon and received from plaintiff a written
assignment of all of plaintiff's title and interest in his cont-
ract with the City and in the tank and tower. About this time,
or later, the agent of defendant, the Continental Steel &
Chemical Co. to sell it and to re-erect the tank and tower
at New Athens, Illinois, which it did, and, in June, and
in December, 1919, returned from Granby with
structural iron worker in his employ, to York Arthur, to dis-
mantle and tear down the tank and tower. [illegible] on the
job for several weeks and while dismantling the roof and two
or three rings of the tank the guys slackened the job was returned
to Chicago. Mr. Gerhardt did not observe the trouble, it would
take any time. Burke's testimony as to the effect that
he found the roof in bad shape - the majority of the guys
being "bended, rotted through;" so the tank had been built

found the rivet heads on the inside of the two top rings had been eaten off by rust; that the sheets were so badly pitted that they could not be used again, although the condition of the bottom ones was not so bad; and that he concluded that the tank was not in such condition that it could be taken down and re-erected, that while the bottom part might be so used the rest was "serviceable for junk only." He, however, expressed the opinion that "the tank with additional material could have been taken down and erected, with the rusted portions taken out and replaced with new or second hand portions," but at great expense. He further testified as to the tower that he found the four main posts in fair condition, though a little rusted; and that about five of the cross-beams or struts were badly rusted and were not of sufficient strength to hold a tank of that size if filled with water.

The evidence as to plaintiff's representations made to defendant after the former's trip to Texas and his inspection of the tank and tower is conflicting. Defendant testified on direct examination in substance that plaintiff told him that the tank "was in first class condition except the walk around, and one of the struts in, the tower," that the plates were of the thickness of 5/16ths of an inch as indicated on a drawing, that defendant "could take the tank down and re-erect it and deliver it to a customer," and that defendant "believed those statements to be true and relied upon them absolutely." Yet, on cross-examination defendant admitted that plaintiff told him that the ladder was no good, that some of the supporting arches of the tower were badly beaded, that the roof of the tank was badly corroded, and that the balcony floor around the tank was corroded and in bad shape; and defendant stated that plaintiff did not inform him how many years the tank had been erected and that plaintiff did

found the rivet heads on the inside of the two top rings had been eaten off by rust; that the sheets were so badly pitted that they could not be used again, although the condition of the bottom ones was not so bad; and that he concluded that the tank was not in such condition that it could be taken down and re-erected, that while the bottom part might be so used the rest was "serviceable for junk only." He, however, expressed the opinion that "the tank with additional material could have been taken down and erected, with the rusted portions taken out and replaced with new or sound band portions," but at great expense. He further testified as to the power that he found the four main posts in fair condition, though a little rusted; and that about five of the crown-bars or struts were badly rusted and were not of sufficient strength to hold a tank of that size if filled with water.

The evidence as to plaintiff's representations made to defendant after the former's trip to Texas and his inspection of the tank and tower is conflicting. Defendant testified on direct examination in substance that plaintiff told him that the tank "was in first class condition except the sunk around, and one of the struts in the tower," that the piston ware of the thickness of 5/16ths of an inch as indicated on a drawing, that defendant "could take the tank down and re-erect it and deliver it to a customer," and that defendant believed these statements to be true and relied upon them absolutely." Yor, on cross-examination defendant admitted that plaintiff told him that the lower ring was good, that some of the supporting arches of the tower were badly pocked, th t the roof of the tank w s badly out edged, and that the balcony floor around the tank was corroded and in bad

not say that in making his inspection he went inside of the tank; and defendant further admitted that, "wanting some little line" on the tank and tower, he caused the said report thereon of Dismukes to be made to him, which he received 10 days before he made the purchase. Plaintiff's testimony as to what he told defendant as to the condition of the tank and tower prior to the sale, is, in substance, that in making his inspection of the tank he had no facilities for getting inside thereof and did not inspect the inside; that the scuttle hole was badly rusted, that some of the plates of the tank and some portions of the tower were in such condition that they would have to be replaced by new material, that he had measured the plates at the edges and that they were of the thickness mentioned in the drawing, that the upper ring of the tank was rusted but that from the outside the other plates of the tank did not appear to be pitted, and that, in his opinion, by replacing the steel whereever found to be corroded and by careful dismantling, the tank could be re-erected in another place.

In the case of Roberts v. Applegate, 153 Ill., 210, 216, in discussing an alleged warranty, the court said, quoting from Kenner v. Harding, 85 Ill. 264, 268: "In determining whether there was in fact a warranty, the decisive test is, whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon the matter of which the vendor has no special knowledge, and on which the buyer may be expected, also, to have an opinion and to exercise his judgment. In the former case, there is a warranty; in the latter, not." In Telluride Power Co. v. Crane Co., 208 Ill. 218, which was a suit at law to recover the balance due on a contract of sale of a quantity of iron pipe, the court said (p. 227): "In the bargain and sale of an existing chattel there is not, in

not say that in making his inspection he went inside of the tank; and defendant further admitted that, "wanting some little time" on the tank and tower, he caused the said report thereon of Diamukes to be made to him, which he received 10 days before he made the purchase. Plaintiff's testimony as to what he told defendant as to the condition of the tank and tower prior to the sale, is, in substance, that in making his inspection of the tank he had no facilities for getting inside thereof and did not inspect the inside; that the outside hole was badly rusted, that some of the plates of the tank and some portions of the tower were in such condition that they would have to be replaced by new material, that he had measured the plates at the edges and that they were of the thickness mentioned in the drawing, that the upper ring of the tank was rusted but that from the outside the other plates of the tank did not appear to be pitted, and that, in his opinion, by replacing the steel wherever found to be corroded and by careful diamuptiing, the tank could be re-erected in another place.

In the case of Loomis v. Appleyard, 185 Ill., 210, 218, in discussing an alleged warranty, the court said, quoting from Kenner v. Harding, 85 Ill. 264, 268: "In determining whether there was in fact a warranty, the decisive test is, whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon the matter of which the vendor has no special knowledge, and on which the buyer may be expected, also, to have an opinion and to exercise his judgment. In the former case, there is a warranty; in the latter, not." In Dalrymple Power Co. v. Stone Co., 209 Ill. 218, which was a suit at law to recover the balance due on a contract of sale of a quantity of iron pipe, the court said (p. 227): "In

the absence of fraud, an implied warranty of good quality or condition of the thing sold. In Ramming v. Caldwell, 43 Ill. App., 175, where plaintiff sued to recover the purchase price of a second hand boiler sold to defendant and the boiler was found to be so eaten up with rust and out of repair that it would not work properly, the court said (p. 179): "No implication arises that a warranty exists that the article, sold as second hand goods, will answer the purpose for which made." In Fuchs & Lang Co. v. Kittredge & Co., 242 Ill., 88, 95, which was a suit at law to recover the price of a certain machine, in which the defense was that the vendee was induced to order the machine through the false representations of the vendor's agent, the court said: "The false representation which can be made the basis of an action or the rescission of a contract, where there is no relation of confidence, must be of a material fact. Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against. Exaggeration in the commendation of articles offered for sale will not avoid a contract." In Gillespie v. Fulton Oil & Gas Co., 236 Ill., 188, 198, it is said: "A misrepresentation which will warrant a court of equity in setting aside a contract must contain the following elements: First, its form must be a statement of fact; second, it must be made for the purpose of inducing the other party to act; third, it must be untrue; fourth, the party making the statement must know or believe it to be untrue; fifth, the person to whom it is made must believe in and rely upon the truth of the statement; sixth, the statement must be material." In Crocker v. Manley, 164 Ill. 282, which was a case involving alleged false representations as to the richness of a silver mine, the court quoted from the case of Farnsworth v. Duffner, 142 U. S., 43, as follows (p. 296): "And in 2 Pomeroy's

the absence of fraud, an implied warranty of good quality or condition of the thing sold. In Manning v. Oglivell, 43 Ill. App., 179, where plaintiff sued to recover the purchase price of a second hand boiler sold to defendant and the boiler was found to be so eaten up with rust and out of repair that it would not work properly, the court said (p. 179): "No implication arises that a warranty exists that the article, sold as second hand goods, will answer the purpose for which made." In Moore & Lane Co. v. Kittredge & Co., 242 Ill., 89, 93, which was a suit at law to recover the price of a certain machine, in which the defense was that the vendee was induced to order the machine through the false representations of the vendor's agent, the court said: "The false representation which can be made the basis of an action or the rescission of a contract, where there is no relation of confidence, must be of a material fact. Matters of opinion are not relied upon against. Exaggeration in the commendation of articles offered for sale will not avoid a contract." In Gillespie v. Fulton Oil & Gas Co., 254 Ill., 186, 188, it is said: "A misrepresentation which will warrant a court of equity in setting aside a contract must contain the following elements: First, its form must be a statement of fact; second, it must be made for the purpose of inducing the other party to act; third, it must be untrue; fourth, the party making the statement must know or believe it to be untrue; fifth, the person to whom it is made must believe in and rely upon the truth of the statement; sixth, the statement must be material." In Crocker v. Manley, 164 Ill. 380, which was a case involving alleged false representations as to the richness of a silver mine, the court quoted from the case of Farnsworth v. Duffner, 142 U. S., 43, as follows (p. 53): "And if a purchaser's

Equity Jurisprudence (sec. 892) it is declared that a party is not justified in relying upon representations made to him: '(1) When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; (2), When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; (3) when the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.' But if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, a fortiori is he precluded when it appears that he did make such examination and relied upon the evidence obtained by such examination, and not upon the representations."

In the present case, under the facts as disclosed from the evidence and under the law, we do not think that the defendant presented any defense which would avoid the payment of the amount of the note and interest. No express warranty as to the tank and tower is shown and under the circumstances none can be implied. And we do not think that the evidence shows that plaintiff made any false representations, knowing or believing at the time that they were untrue. Even if it be considered that some of plaintiff's representations were untrue, it does not appear that defendant relied upon them. On the contrary it appears that he had an agent inspect the tank and tower and report upon their condition before he made the purchase and assumed plaintiff's contract with the City of Port Arthur. Much stress is laid upon plaintiff's alleged representation to the effect that the tank and tower was in such condition that it could be taken down, removed to another place and there re-erected. Even if it be considered that plaintiff so stated without qualification,

Equity Jurisprudence (sec. 802) it is declared that a party is not justified in relying upon representations made to him: '(1) when, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; (2). When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; (3) when the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.' But if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, a fortiori it be precluded when it appears that he did make such examination and relied upon the evidence obtained by such examination, and not upon the representations."

In the present case, under the facts as disclosed from the evidence and under the law, we do not think that the defendant presented any defense which would avoid the payment of the amount of the note and interest. In exhibit entirely as to the task and labor is shown and under the circumstances none can be implied. And we do not think that the evidence shows that plaintiff made any false representations, knowing or believing at the time that they were untrue. Even if it be considered that some of plaintiff's representations were untrue, it does not appear that defendant relied upon them. On the contrary it appears that he had an expert inspect the tank and report upon their condition before he made the purchase and released plaintiff's attorney with the duty of performing. Such action in full upon plaintiff's alleged representation to the effect that the tank and tower was in such condition it could be torn down, removed to another place and there re-erected. Even if it be considered that plaintiff so stated without qualification,

although his testimony shows that the statement was materially qualified in that many parts would have to be replaced with new material, we think the statement must be considered merely as his opinion or judgment upon a matter, on which defendant should be expected to exercise an independent judgment.

For the reasons indicated the judgment of the Municipal Court is reversed, and judgment is entered here against the defendant, William Seymour, for the amount of said note, $500, together with interest thereon at 5% per annum from December 27, 1919, $50, being the total amount of $550.

REVERSED AND JUDGMENT HERE FOR $550.

Barnes and Morrill, JJ., concur.

although his testimony shows that the statement was materially qualified in that many parts would have to be replaced with new material, we think the statement must be considered merely as his opinion or judgment upon a matter, on which defendant should be expected to exercise an independent judgment.

For the reasons indicated the judgment of the municipal Court is reversed, and judgment is entered here against the defendant, Gilliam Seymour, for the amount of said note, $800, together with interest thereon at 8% per annum from December 27, 1919, 'til, being the total amount of $850.

REVERSED AND JUDGMENT HERE FOR $850.

Barnes and Morrill, JJ., concur.

390 - 26564

FINDING OF FACTS.

We find as facts in this case that at and before the time of the execution of the note sued upon the plaintiff, J. Norman Jensen, did not make any false or fraudulent representations, upon which the defendant, William Seymour, relied, as to the condition of the tank and tower in question.

200 - 26564

FINDING OF FACTS.

We find as facts in this case that at and before the time of the execution of the note sued upon the plaintiff, J. Norman Jenson, did not make any false or fraudulent representation, upon which the defendant, William Seymour, relied, as to the condition of the tank and tower in question.

93 - 26748

DAN TOUMEY,
Appellee,

vs.

HERMAN SCHMIDT,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 643

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 2, 1919, plaintiff sued defendant in the Municipal Court of Chicago to recover the sum of $200, which the latter had received as a loan in September, 1918. Defendant filed an affidavit of merits, together with a statement of claim of set-off. He did not dispute the loan or the amount thereof, but claimed that plaintiff was indebted to him in the sum of $183.75, for certain commissions in pursuance of two express agreements, whereby in September, 1918, defendant agreed to purchase for plaintiff 25 barrels of whiskey for a commission of 5 cents per gallon, to be paid by plaintiff upon the purchase being consummated, and whereby in December, 1918, defendant agreed to purchase for plaintiff 50 additional barrels of whiskey upon the same terms, and that defendant had purchased all of said whiskey, amounting to 3675 gallons, and that the same had been accepted and paid for by plaintiff, but that defendant had not received any part of said sum of $183.75, as commissions, which was a proper off-set as against plaintiff's claim. In his affidavit of merits to defendant's claim of set-off, plaintiff denied making the alleged agreements to pay commissions, denied that defendant had purchased the whiskey for him, denied that he was indebted to defendant in any amount, but he did not set up as a defense that defendant at said dates was not licensed as a broker in the purchase or sale of whiskey.

83 - 86748

DAN YOUNKEY,

Appellee,

vs.

HERMAN SCHMIDT,

Appellant.

MUNICIPAL COURT

OF CHICAGO.

APPEAL FROM

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On July 2, 1918, plaintiff sued defendant in the Municipal Court of Chicago to recover the sum of $300, which the latter had received on a loan in September, 1918. Defendant filed an affidavit of merits, together with a statement of claim of set-off. He did not dispute the loan or the amount thereof, but claimed that plaintiff was indebted to him to the sum of $103.75, for certain commissions in connection of two express shipments, whereby in September, 1918, defendant agreed to purchase for plaintiff 25 barrels of whiskey for a commission of 5 cents per gallon, to be paid by plaintiff upon the purchase being consummated, and whereby in November, 1918, defendant agreed to purchase for plaintiff 50 barrels of whiskey for a commission of 5 cents per gallon, to be paid by plaintiff upon the same being consummated, and that defendant had received and paid for plaintiff, but that defendant had received any part of said sum of $103.75, as commissions, though was a burden of defendant to prove. In his affidavit of merits to defendant's claim of set-off, defendant denied making the alleged agreement to pay commission, stated that defendant had received the whiskey for him, denied that he was indebted to defendant in any sum whatever, but that if he was he is not up to a defense that defendant is not liable because of a breach of contract by plaintiff in the purchase of whiskey.

On the trial before a jury, the indebtedness to plaintiff on the loan being admitted, defendant was first called as a witness to sustain the allegations of his claim of set-off and plaintiff was called as a witness under section 53 of the Municipal Court Act. Their testimony made out a strong prima facie case for defendant on his claim of set-off. On cross-examination defendant testified in substance that he was a whiskey broker at the times of the making of said agreements and had been such until the time of the trial. He was not asked any question relative to his having or not having a license at said times, or at the times plaintiff bought the whiskey, to act as such a broker and no evidence was introduced in reference thereto. At the conclusion of defendant's evidence, the court, on plaintiff's motion and over the objection of defendant, instructed the jury to return a verdict finding the issues against defendant and to assess plaintiff's damages at the sum of $200. The jury returned such a verdict and judgment was entered against defendant in such sum and this appeal followed.

It is apparent that the court gave the instruction on the assumption that it was incumbent upon defendant, as a part of his prima facie case, to show that at the times stated he was duly licensed to act as a whiskey broker. Under the state of the pleadings and the evidence introduced we think that it was to be presumed that defendant was duly licensed, that the burden of showing to the contrary was upon the plaintiff, and that the court erred in giving the peremptory instruction. The question of the existence or non-existence of a license to defendant to act as a whiskey broker was only collaterally involved. In Abbau v. Grassie, 262 Ill., 636, 638, it is said: "The authorities are not all in harmony as to who has the burden of proof

On the trial before a jury, the independence to plaintiff on the issue being submitted, defendant was first called as a witness to sustain the allegations of his claim of set-off and plaintiff was called as a witness under section 99 of the Municipal Court Act. Their testimony made out a strong prima facie case for defendant on his claim of set-off. On cross-examination defendant testified in substance that he was a whiskey broker at the time of the making of said agreements and had been such until the time of the trial. He was not asked any question relative to his having or not having a license at said time, or at the times plaintiff bought the whiskey, to wit as such a broker and no evidence was introduced in relevance thereto. At the conclusion of defendant's evidence, the court, on plaintiff's motion and over the objection of defendant, instructed the jury to return a verdict finding the issues against defendant and to assess plaintiff's damages at the sum of $200. The jury returned such a verdict and judgment was entered accordingly. Defendant in such new and duly noted exceptions to the rulings of the court upon the instructions given.

It is apparent that the court gave the instruction on the assumption that it was incumbent upon defendant, in a suit of his prima facie case, to show that the items stated he was duly licensed to act as a whiskey broker. Under the acts of the pleadings and the evidence introduced we think that it was to be presumed that defendant was duly licensed, that the burden of showing to the contrary was upon the plaintiff, and that it cannot avail the defendant in this action. The question was raised in the peremptory instruction. The instruction of the existence or non-existence of a license to defendant to act as a whiskey broker was only collaterally involved. In Ryman v. Dressmig, 208 Ill., 604, 606, it is said: "The authorities are not all in harmony as to who has the burden of proof

on the question whether one of the parties is duly licensed to practice a certain profession or do a certain class of business. * * Where the question arises directly on an indictment or in a penal action for violating the statute, where the prosecution is on behalf of the public, the authorities all agree that the burden of proof rests upon the defendant. * * The weight of authority, however, is to the effect that where the question of such a license is only collaterally involved, the license will be presumed unless proof to the contrary is presented by the other party. (McPherson v. Cheadell, 24 Wend., 15; Smith v. Joyce, 12 Barb. 21; Thompson v. Sayre, 1 Denio, 178; Brown v. Young, 2 B. Mon. 26; Horan v. Keiler, 41 Pa. St. 470."

The judgment of the Municipal Court is reversed and the cause is remanded for a re-trial.

REVERSED AND REMANDED.

on the question whether one of the parties is duly licensed to practice a certain profession or do a certain class of business. * * Where the question arises directly as an indictment or in a penal action for violating the statute, where the prosecution is on behalf of the public, the authorities all agree that the burden of proof rests upon the defendant. * * The weight of authority, however, is to the effect that where the question of such a license is only collaterally involved, the license will be presumed unless proof to the contrary is presented by the other party. (McPherson v. Cheadell, 24 Wend. 15; Smith v. Joyce, 12 Barb. 21; Thompson v. Sayre, 1 Denio, 175; Brown v. Young, 2 B. Mon. 26; Horan v. Weiler, 41 Pa. St. 470."

The judgment of the Municipal Court is reversed and the cause is remanded for a re-trial.

REVERSED AND REMANDED.

106 - 26762

M. C. KASPER,
Appellant,

vs.

MATHUSZ FUDACZ,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 643

MR. PRESIDING JUSTICE CHIDLEY DELIVERED THE OPINION OF THE COURT.

On a trial before a jury in the Municipal Court of Chicago a verdict was returned finding the issues against plaintiff, and on November 27, 1920, a judgment was entered against plaintiff for costs and this appeal followed. No printed brief and argument on behalf of defendant has been filed in this court.

In June, 1912, plaintiff purchased a drug store at 2901 Wallace street, Chicago, of one Chelowinski for $3500. In order to make a cash payment on the purchase price he borrowed either $1600 or $1800 from defendant, took possession of the store and operated it. Later he borrowed $200 more from defendant. In January, 1917, he sold the store to one Warczynski for $4000, receiving $1600 in cash and $2400 in 32 notes of $75 each, one maturing each month. At this time he was still indebted to defendant for money borrowed but the amount of the indebtedness was in dispute. He was also indebted to Philip Bellek in the sum of $200 and to John Fudacz in a like sum - a total of $400. About this time he enlisted in the American Army. Being desirous of settling his debts before leaving for France, he called on defendant and certain negotiations were had. According to plaintiff's testimony his indebtedness to defendant was fixed at $2000, and to

105 - 85928

M. C. KRAUSE,

Appellant,

vs.

NATHAN RUBACK,

Appellee.

IN CHICAGO.

MUNICIPAL COURT.

APPEAL FROM

No. ... AFFIRMING JUDGMENT ENTERED BY THE DIVISION OF THE COURT.

On a trial before a jury in the Municipal Court of Chicago a verdict was returned finding the issues against plaintiff, and on November 27, 1926, a judgment was entered against plaintiff for costs and this appeal follows. On trial and argument on behalf of defendant it was urged in order to make a cash payment on the purchase price he borrowed either $1000 or $1500 from defendant, that subsequent to the above and aforesaid it. After he borrowed $500 more from defendant. In January, 1925, he paid the loan to one Weczynski for $4000, receiving $1000 in cash and $3000 in 36 notes of $83 each, one maturing each month. [illegible] 25 notes of the indebtedness [illegible] to defendant for money borrowed [illegible] amount of the indebtedness [illegible] to Public Notice in the sum of $500 and to take effect in like sum - a total of 1500. [illegible] the American Way. [illegible] before leaving for France, he called on defendant and [illegible] negotiations were had. [illegible] to plaintiff's [illegible]

enable defendant to receive payment of said amount he delivered to defendant, and the latter accepted, said 32 notes, aggregating $2400, and it was agreed that defendant should collect these notes and pay out of the proceeds the sum of $400 to Bollek and John Fudacz and retain the balance in liquidation of plaintiff's said indebtedness to him. On the trial defendant admitted that he had collected the amounts due on all of the notes, but that he had paid nothing to said Bollek or John Fudacz, and further admitted that at the time of the said negotiations he promised plaintiff that he would "pay these men off", and that subsequently he told John Fudacz that he would pay him $200 if he collected the notes. It further appears that while plaintiff was in France he received a letter from defendant dated August 13, 1919, a portion of which is as follows: "You have written me whether I have satisfied John Fudacz and Philip; I have not as yet, because I have waited for you when you will get back."

Plaintiff brought suit on the theory that an agreement of settlement had been made as to the amount of his indebtedness to defendant and as to the mode of settlement, that plaintiff had carried out his part of the agreement but that defendant had not performed his part, that defendant had collected the full amount due on the 32 notes but had failed to pay $400 thereof to the parties designated and had failed and refused to account therefor to plaintiff when requested, and that defendant was indebted to plaintiff in said sum. Defendant's theory of defense was, as disclosed from his affidavit of merits, that when plaintiff purchased the drug store in June, 1912, a verbal agreement was made between plaintiff and defendant that they should become partners in the business of operating said store; that plaintiff there-

enable defendant to receive payment of said amount be delivered to defendant, and the latter accepted, said 33 notes, aggregating $2400, and it was agreed that defendant should collect these notes and pay out of the proceeds the sum of $400 to Wallak and John Fudeas and retain the balance in liquidation of plaintiff's said indebtedness to him. On the trial defendant admitted that he had collected the amounts due on all of the notes, but that he had paid nothing to said Wallak or John Fudeas, and further admitted that at the time of the said negotiations he promised plaintiff that he would "pay these men off", and subsequently he told John Fudeas that he would pay him $200 if he collected the notes. It further appears that while plaintiff was in Greece he received a letter from defendant dated August 22, 1913, a portion of which is as follows: "You have written me whether I have satisfied John Fudeas and Phillip; I have not as yet, because I have waited for you when you will get back."

Plaintiff brought suit on the theory that an agreement of settlement had been made as to the amount of his indebtedness to defendant and as to the mode of settlement, that plaintiff had carried out his part of the agreement but that defendant had not performed his part, that defendant had collected the full amount due on the 33 notes but had failed to pay $400 thereof to the parties mentioned and had failed and refused to account therefor to plaintiff when requested, and that defendant was indebted to plaintiff in said sum. Defendant's theory of the case, as disclosed from his affidavit of merits, was that when plaintiff purchased the candy store in June, 1912, a verbal agreement was made between plaintiff and defendant that they should become partners in the business of operating said store; that plaintiff had -

after operated the store for their joint benefit; that when plaintiff sold the store to Warczynski he received $1600 in cash (which he had converted to his own use for his share in the business), and said 32 notes, which he thereafter delivered to defendant "as and for defendant's share in the drug business." This theory is at variance with defendant's testimony and letter, as above outlined, and with his testimony to the effect that he had never asked plaintiff "for any earnings of the drug store." Furthermore, plaintiff denied the existence of any partnership agreement with defendant, and it further appeared on the trial that when plaintiff purchased the drug store a bill of sale of the stock and fixtures was executed by the seller to plaintiff alone, and the notes given at the time for the balance of the purchase price were signed by plaintiff alone.

In 12 Corpus Juris 337, it is said: "After a valid compromise agreement has been entered into any subsequent remedy of the parties, with reference to the matters included therein, must be based on the agreement, it operating as a merger and bar of all included claims and pre-existing causes of action, and it is not necessary that the compromise shall have been performed." See, also, Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill., 25, 34.

We are of the opinion that the verdict and judgment are against the manifest weight of the evidence and against the law. Furthermore, we think that the trial court erred in refusing to give to the jury two instructions, offered by plaintiff, which were framed upon his theory of the case and which stated the law with substantial accuracy. He had a right to have the jury instructed upon his theory of the case,

right to have the jury instructed upon his theory of the case, which stated the law with unquestionable accuracy. He had a right to rely upon the court to instruct the jury in the law. Furthermore, we think that the trial court erred in refusing to give to the jury the instructions, offered by plaintiff, which would frame his theory of the case in the pleadings, and would be evidence and material to the defendant "as and for defendant's share in the drug business." This theory is at variance with defendant's testimony and letter, as above outlined, and with his testimony to the effect that he never asked plaintiff "for any earnings of the drug store." Furthermore, plaintiff denied the existence of any partnership agreement with defendant, and it further appeared on the trial that when plaintiff purchased the drug store a bill of sale of the stock and fixtures was executed by the seller to plaintiff alone, and the notes given at the time for the balance of the purchase price were signed by plaintiff alone.

In 13 Corpus Juris 317, it is said: "After a valid ownership of the parties, with reference to the matters included therein, must be based on the agreement. It operating as a matter and fact of all included claims and pre-existing causes of action, and it is not necessary that the memoranda upon which have been performed." See, also, Brandlorfy v. Pioneer Construction Fire Co., 240 Ill., 98, 94.

In one of the opinion that the verdict and judgment

where, as shown, that theory had a basis in the evidence upon which to rest. (Chicago Union Traction Co. v. Browdy, 206 Ill., 615, 623.)

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, J., concurs;

Merrill, J., took no part in the decision.

where, as shown, that theory had a basis in the evidence upon which to rest. (Chicago Union Traction Co. v. Brady, 206 Ill., 619, 629.)

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Burke, J., concurs;

Morrill, P. J., took no part in the decision.

129 - 26786

EMIL LAMM,
Appellee,

vs.

JACOB SCHNAIR,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 643

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in forcible detainer, commenced on November 9, 1920, for the recovery of the possession of the 2nd flat of the building known as 1317 S. Lawndale avenue, Chicago, the court directed the jury at the conclusion of all the evidence to find the defendant, Jacob Schnair, guilty of unlawfully withholding from plaintiff the possession of the premises, the jury returned such a verdict, and, on November 24, 1920, the court adjudged that the plaintiff recover possession of the premises and that a writ of restitution issue. This appeal followed.

Defendant occupied the premises under a written lease, expiring June 30, 1920, and containing the usual covenants, from Dora Becker. The monthly rent reserved was $45, payable on the first day of each and every month. Defendant had the option of retaining the premises for an additional year, expiring June 30, 1921, which he exercised, and was in possession when the action was brought. On November 20, 1919, Dora Becker, lessor, assigned her interest in the lease to plaintiff, and thereafter and up to and including October, 1920, plaintiff received the monthly rent from defendant. Plaintiff commenced the action because he had not received the rent for the month of November, 1920, and before bringing suit he caused a notice to be served personally upon defendant, notifying him that his tenancy in

ZEKIT LAWN,

Appellee,

vs.

MUNICIPAL COURT

OF CHICAGO.

JACOB SCHWARZ,

Appellant.

MR. PRESIDING JUSTICE CHURCHILL DELIVERED THE OPINION OF THE COURT.

In an action in forcible detainer, commenced on November 9, 1920, for the recovery of the possession of the 2nd flat of the building known as 1312 N. Lawndale avenue, Chicago, the court directed the jury at the conclusion of all the evidence to find the defendant, Jacob Schwarz, guilty of unlawfully withholding from plaintiff the possession of the premises, the jury returned such a verdict, and, on November 24, 1920, the court adjudged that the plaintiff recover possession of the premises and that a writ of restitution issue. This appeal followed.

Defendant occupied the premises under a written lease, expiring June 30, 1920, but containing the usual covenants, from Dora Becker. The monthly rent increased the 9th, payable on the first day of each and every month. Defendant had the option of retaining the premises for an additional year, expiring June 30, 1921, which he exercised, and was in possession when the action was brought. In November 30, 1919, Dora Becker, lessor, assigned her interest in the lease to plaintiff, who thereafter and up to the time of filing Opinion Oct. 1921, plaintiff received the monthly rent from defendant. Plaintiff contends that action became personally upon default, notice of which was waived in the lease and that no demand upon the defendant for the 2nd floor premises was necessary before bringing suit. It appears that defendant had not received the rent for the month of November, 1920,

the premises had been terminated because of his default in the payment of rent. He testified that on November 3, 1920, and again on the following day he telephoned defendant's apartment, informed the person who answered the telephone call that the November rent had not been paid and inquired when it would be paid, and that upon each occasion said person immediately hung up the receiver. He further testified that early in October, 1920, he received in the usual course of mail a letter, duly addressed to him, dated September 30, 1920, and signed "Jacob Schnair," as follows:

> "I am sending you a check for rent for the whole month of October. A man was here to fix the water and he did not fix it right. I'm sick and tired of you. If you are not going to send a good man and fix it right, I'm not going to pay rent and I'll have it fixed myself by a good man, or else I am going to report you to the Health Department and let them decide."

On the trial defendant attempted to show that on October 29, 1920, he had caused a check for $45 to be written out by one H. Krulewich, payable to the order of "Jacob Schnair," and on the back of which he had caused one S. Pekowsky to write the endorsement: "This check is for rent for 1317 S. Lawndale from November 1st to December 1st, 1920;" and that on the following day he had caused the check to be put in a stamped envelope, properly addressed to plaintiff and sealed, and that defendant had personally deposited said letter in a government mail box. Plaintiff denied receiving any such letter or check. Even if he had, the check would have been worthless in his hands for there was no testimony that the check, which was made payable to defendant's order, had been endorsed by him.

Under the peculiar facts, as disclosed from the entire evidence, we are of the opinion that the trial court was fully justified in directing the jury to return the verdict they did,

the premises had been terminated because of his default in the payment of rent. He testified that on November 3, 1930, and again on the following day he telephoned defendant's apartment, informed the person who answered the telephone call that the November rent had not been paid and inquired when it would be paid, and that upon each occasion said person immediately hung up the receiver. He further testified that early in October, 1930, he received in the usual course of mail a letter, duly addressed to him, dated September 30, 1930, and signed "Jacob Schmalz," as follows:

> "I am sending you a check for rent for the whole month of October. A man was here to fix the water and he did not fix it right. I'm sick and tired of you. If you are not going to send a good man and fix it right, I'm not going to pay rent and I'll move it fixed myself by a good man, or else I am going to report you to the Health Department and let them decide."

On the trial defendant attempted to show that on October 30, 1930, he had caused a check for $45 to be written out by one R. Kunlavich, payable to the order of "Jacob Schmalz," and on the back of which he had caused one P. Lyckowsky to write the endorsement: "This check is for rent for 1312 B. Limehouse from November 1st to December 1st, 1930;" and that on the following day he had caused the check to be put in a stamped envelope, properly addressed to plaintiff and sealed, and that defendant had personally deposited said letter in a Government mail box. Plaintiff denied receiving any such letter or check. Even if he had, the check would have been worthless in his hands for there was no testimony that the check, when made payable to defendant's order, had been endorsed by him.

Under the peculiar facts, we disagree from the entire jurisdiction in directing the jury to return two verdict they did, evidence, as was of the opinion that the trial court was fully

and in entering the judgment appealed from. Accordingly the judgment is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

and in entering the judgment obtained them. Accordingly

the judgment is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

142 - 26800

JAMES DeBOER and ANDREW DeBOER, copartners, etc.,
Appellees,

vs.

J. C. MECARTNEY, doing business as J. C. Mecartney & Co.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 643

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $70, rendered against the defendant (appellant) by the Municipal Court of Chicago on January 20, 1921, after a trial before the court without a jury. The appellees have not filed any appearance or any printed brief in this court.

The action, which is in contract, was commenced on October 28, 1920. In addition to J. C. Mecartney, the Economy Tire and Rubber Company, a corporation, and Nathan Bloomfield, president thereof, were made parties defendant, but during the trial the cause was dismissed as to the corporation and Bloomfield. Plaintiff's claim, amounting to $70, was for work and labor done in removing certain rubbish during the month of May and on June 4th, 1920, from a building at 1206 W. 15th street, Chicago, which building had theretofore been partially destroyed by fire. Forty yards of rubbish were removed at a price of $1.75 per yard. The defendant, Mecartney, was the agent for the owner of the building and the corporation was the tenant.

Counsel for Mecartney contend that the evidence does not disclose any liability on Mecartney's part to pay for the removal of the rubbish. We find that the testimony heard at

JAMES MORGAN and ANDREW DEBOER,
copartners, etc.,
Appellees.

vs.

J. C. MCCARTHY, Sales Machine
as J. C. McCarthy & Co.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE CHAMBERLIN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $70, rendered against the defendant (appellant) by the Municipal Court of Chicago on January 20, 1931, after a trial before the court without a jury. The appellee have not filed any appearance or any printed brief in this court.

The action, which is in contract, was commenced on October 28, 1930. In addition to J. C. McCarthy, the Economy Tire and Rubber Company, a corporation, and Ethan Bloomfield, president thereof, were made parties defendant, but during the trial the cause was dismissed as to the corporation and Bloomfield. Plaintiff's claim, amounting to $70, was for work and labor done in removing certain rubber tiling the month of May and on June 4th, 1930, from a building at 1440 - 1448 Irving Park boulevard, Chicago, which building one Theodore Jean Peretsky destroyed by fire. Forty yards of rubber matting were removed at a price of $1.75 per yard. The defendant, McCarthy, was the agent for the owner of the building and the corporation was the tenant.

Counsel for McCarthy contend that the evidence does not disclose any liability on McCarthy's part to pay for the removal of the matting. We find that the testimony bears us

the trial is imperfectly abstracted. Some material portions are entirely omitted from the abstract. After an examination of the bill of exceptions contained in the transcript, we are of the opinion that the finding and judgment are sufficiently sustained by the evidence. No useful purpose will be served in a discussion of it, more than to mention that it appears that an inspector of the City of Chicago insisted upon the removal of the rubbish, that Mecartney agreed that plaintiffs might remove the same at the price mentioned and that it was removed to the amount and at the times mentioned. The judgment is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

the trial is imperfectly abstracted. Some material portions are entirely omitted from the abstract. After an examination of the bill of exceptions contained in the transcript, we are of the opinion that the finding and judgment are sufficiently sustained by the evidence. No useful purpose will be served in a discussion of it, more than to mention that it appears that an inspector of the City of Chicago insisted upon the removal of the tubbing, that Mr. Conway agreed that plaintiff might remove the same at the price mentioned and that it was removed to the amount and at the times mentioned. The judgment is affirmed.

JUDGMENT.

Barnes and Morrill, JJ., concur.

177 - 26837

MARCUS RICHTMAN and SAMUEL KATZ,
Appellees,

v.

WALLACE M. BURROUGHS, sued as Dr. William Burroughs,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 643

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class tort case, tried before one of the judges of the Municipal Court of Chicago, without a jury, on September 28, 1920, the plaintiffs recovered a judgment for $138 against the defendant.

On October 16, 1919, defendant, then the owner of a two-flat brick building, at 2030 Humboldt Boulevard, Chicago, entered into a written agreement with plaintiffs to sell to them the building and the land on which it stood. At this time he had his residence in one of the flats, and it was provided in the agreement that he was to remain in possession of the flat until April 30, 1920. Thereafter the agreement was consummated and defendant became the tenant of plaintiffs and continued so to be until April 30, 1920, when he vacated the flat. In moving out his household effects he took away his gas-range and his refrigerator. There was evidence tending to show that the market value thereof was $138. There was no evidence showing that either the range or the refrigerator was permanently attached to the building, or that their removal damaged the building, and in said agreement of sale no mention was made of them.

Plaintiffs, on the theory that the range and refrigerator were fixtures and that the ownership thereof passed to them when they purchased the building, brought the present action, charging in their statement of claim that defendant had wrongfully converted the articles to his own use. The trial court found the defendant guilty and assessed plaintiff's damages at the sum of $138, in tort, and

177 - 28087

MARCUS RICHTMAN and SAMUEL KATZ,

Appellees,

v.

MARTHUR M. ROSENBERG, Mas[illegible]
as Dr. William Metzenbaum,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

[illegible] 2223 I.A. 643

MR. PRESIDING JUSTICE CHIPMAN DELIVERED THE OPINION OF THE COURT.

In a 4th class tort case, tried before one of the judges of the Municipal Court of Chicago, without a jury, on September 28, 1920, the plaintiffs recovered a judgment for $138 against the defendant.

On October 16, 1919, defendant, then the owner of a two-flat brick building, at 3000 Humboldt Boulevard, Chicago, entered into a written agreement with plaintiffs to sell to them the building and the land on which it stood. At this time he had his residence in one of the flats, and it was provided in the agreement that he was to remain in possession of the flat until April 30, 1920. Thereafter the agreement was consummated and defendant became the tenant of plaintiffs and continued so to be until April 30, 1920, when he vacated the flat. In moving out his household effects he took away his gas-range and his refrigerator. There was evidence tending to show that the market value thereof was $138. There was no evidence showing that either the range or the refrigerator was permanently attached to the building, or that it would damaged the building, and in said agreement it was no question was made of them.

Plaintiffs, on the theory that the range and refrigerator were attached and that the ownership thereof passed to them when they purchased the building, brought the present suit, entering in their statement of claim that defendant had wrongfully converted the fixtures and that the ownership thereof passed to them when they acquired the building, brought the present suit, entering in their statement of claim that defendant had wrongfully converted the articles to his own use. The trial court found the defendant guilty and assessed plaintiffs' damages at the sum of $138, in tort, and

entered the judgment appealed from.

We are of the opinion that under the facts disclosed the judgment cannot stand. Refrigerators and gas ranges are not generally considered as fixtures, unless they are so permanently attached to the building that their removal will materially injure it. (13 Encyc. Law, 2nd Ed. 647; Merle v. Beifeld, 194 Ill. App. 364, 380; 275 Ill. 594, 609; Jenningsv. Vahey, 183 Mass. 47, 48). In the present case the evidence does not disclose that the refrigerator and gas-range were so permanently attached to the building that their removal by defendant materially injured the building. And defendant should not have been held guilty of wrongfully converting to his own use his own property. The judgment of the Municipal Court is reversed.

REVERSED WITH FINDING OF FACT.

BARNES, and MORRILL, JJ., concur.

entered the judgment appealed from.

We are of the opinion that under the facts disclosed the judgment cannot stand. Refrigerators and gas ranges are not generally considered as fixtures, unless they are so permanently attached to the building that their removal will materially injure it. (13 Mass. Law, 2nd Ed. 647; Merrie v. Boutell, 194 III. App. 364, 380; 278 III. 394, 609; Jennings. Tumbay, 183 Mass. 47, 48). In the present case the evidence does not disclose that the refrigerator and gas-range were so permanently attached to the building that their removal by defendant materially injured the building. And defendant should not have been held guilty of wrongfully converting to his own use his own property. The judgment of the Municipal Court is reversed.

REVERSED WITH FINDING OF FACT.

BARNES, and MORRITT, JJ., concur.

177 - 26837

FINDING OF FACT. We find as an ultimate fact that the defendant did not wrongfully convert to his own use the refrigerator or gas-range in question.

IVY - ROBEY

FINDING OF FACT. We find as an ultimate fact that the refrigerator or gas range in question, the defendant did not negligently convey to his own use the refrigerator or gas range in question.

40 - 26655

H. H. TAYLOR,
Defendant in Error,

vs.

GEORGE W. FRISBY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 644

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Error is assigned in this case to the action of the trial court in striking defendant's "Sixth" affidavit of defense from the files, and in entering a judgment by default for $2,216.67 on the statement of claim.

Defendant in error urges that to consider the question presented, the motion to strike and said affidavit of defense should have been preserved by a bill of exceptions, and none appears in the record.

It has been frequently held that under the practice that obtains in the Municipal Court an affidavit of merits filed by the defendant is the defendant's pleading and takes the place of a plea in common law actions, and that a motion to strike the same performs the office of a demurrer. In a similar case, Harmon v. Callahan, 286 Ill., 59, it was held that the action of the court in sustaining a motion to strike the affidavit of merits was preserved for review without a bill of exceptions, the motion to strike being one based on the insufficiency of the pleading and not one based on other grounds. It is apparent from this record, as in that case, that the purpose of the motion to strike was to test the sufficiency of the affidavit of defense. In each of the orders striking the previous five affidavits of defense defendant was given leave and time to file a new affidavit. But in the order striking the "Sixth" affidavit

Z. H. YAZDAN,
Defendant in Error,

vs.

GIORGIO B. BIONDY,
Plaintiff in Error.

MOTION TO
ADMIT INFAL COPIES
OF RECORD.

MR. JUSTICE BLACK DELIVERED THE OPINION OF THE COURT.

Error is assigned in this cause to the action of the trial court in striking defendant's "Affidavit of Defense from the files, and in entering a judgment by default for $6,210.07 on the statement of claim.

Defendant in error urges that as counter the question presented, the motion to strike out said affidavit of defense should have been presented by a bill of exceptions, and made appears in the record.

It has been frequently held that under the practice that obtains in the municipal [illegible] affidavit of merits filed by the defendant in the inferior court's discretion, may take the place of a plea in common law actions, and that a motion to strike the same performs the office of a demurrer. In [illegible] Harmon v. Illinois, 186 Ill., p. 1 [illegible] the action of the court in overruling a motion to [illegible] affidavit of defense, the motion to strike being made [illegible] from this record, as in the [illegible] placing and not one [illegible] motion to strike out [illegible] of defense. In each of the [illegible] affidavits of defense [illegible] a new affidavit. [illegible]

no leave was given to file another, and a default judgment was immediately entered for failure to file one. Defendant evidently elected to abide by the last stricken affidavit for the purpose of testing its sufficiency and therefore the motion was in the nature of a demurrer and properly presents the question before us without being preserved in a bill of exceptions.

The statement of claim was for money loaned by plaintiff to defendant and alleged a failure and refusal to pay the same on request as promised. The stricken affidavit denied that it was a loan and set up that it was paid to him as compensation under a verbal contract. While the affidavit unnecessarily proceeds to plead evidentiary facts tending to show that the money was a consideration for the contract, it sets forth in substance, though inartificially, that money was given as compensation for the establishment and operation by defendant of a coal yard for the purpose of advertising and selling coal of a company, of which plaintiff was president, general manager and principal owner. Though poorly pleaded we think the affidavit presented issues of fact that entitled defendant to a trial on their merits. Reduced to simplest terms the issues presented were whether the money was a loan as claimed by plaintiff, or compensation under a contract as claimed by defendant. Whether there was such a contract was a question of fact, and whether the money was given as compensation pursuant to such contract or as a loan was another question of fact which required submission of the case upon evidence. The provisions for simplified procedure in the Municipal Court were not intended to increase the difficulties of putting a controversy at issue.

The judgment will be reversed and the cause remanded for a trial on the issues of fact presented by the last stricken affidavit.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

affidavit.

a trial on the issues of fact presented by the first cause of

The judgment will be reversed and the case remanded for

not intended to lessen the difficulties of drafting a contractual

precipitate for simplified procedure in the just first [illegible]

fact action resulted submission of the case upon [illegible].

pursuant to such contract or on a loan and thereupon [illegible]

a question of fact, nor whether the [illegible] was [illegible]

as claimed by defendant. Neither does the mere [illegible]

a loan as claimed by plaintiff, or conversion under [illegible]

to simplify terms the [illegible] whether the money was

fact that entitled defendant to a trial on the [illegible].

Though poorly pleaded as their the [illegible] is was it

plaintiff was precluded, [illegible] of which

the purpose of [illegible] was selling real of a company,

the enforcement and operation by reference to a [illegible] for

though insufficiently, that money was given [illegible] for

man a consideration for the contract, it made [illegible] in substance,

cause to plead evidentiary facts showing to whom that the money

under a verbal contract. While the affidavit unnecessarily pro-

it was a loan and set up that it was paid to him on consummation

same on request as promised. The opinion affidavit denied that

tiff to default and alleged a failure and refused to pay the

The statement of claim was for money loaned by plain-

before us without point preserved in a bill of exceptions.

the nature of a demurrer and properly presents the question

pose of testing its sufficiency and therefore the motion was in

ly elected to abide by the last stricken affidavit for the pur-

immediately entered for failure to file one. Defendant evident-

no issue was given to file another, and a default judgment was

70 - 26718

SAM YASTROW,
Appellant,

vs.

MICHAEL SCHOENFELD,
doing business as
Packard Motor Livery,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 644

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

February 19, 1920, a judgment for $161.20 and costs was entered for appellant in this case. It was set aside and vacated November 1, 1920, on appellee's motion made October 29, 1920, supported by his attorney's affidavit which set up as the sole ground for the motion that defendant and his attorney had no knowledge of said judgment until several months after its entry, and that the attorney had relied on an oral promise of appellant's attorney to notify him when the cause was set for trial and that he received no such notification.

We need not consider the counter affidavit which denies the making of such promise for a motion or petition of that character, made after the lapse of thirty days from entry of the judgment, can be entertained by the court only when it presents such a state of facts as would cause the judgment to be vacated by a bill in equity. (Section 21 of the Municipal Court Act; American Surety Co. v. Bliss, 214 Ill. App., 466.) No such state of facts is set forth in the affidavit or petition. Not only does it fail to show a want of negligence on the part of the petitioner but it fails to set forth any of the elements of fraud, accident or mistake of which a court of equity would take cognizance.

Accordingly the order vacating the judgment will be reversed.

REVERSED.

Gridley, P. J., and Morrill, J., concur.

70 - 25718

JAKE YANKOFF, Appellant,

vs.

ZIOHANK [illegible] INC., doing business as Packard Motor Livery, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

February 17, 1920, a judgment for [illegible] and costs was entered for appellant in this case. It was set aside and vacated November 1, 1920, on appellee's motion made October 20, 1920, supported by his attorney's affidavit which set up as the sole ground for the motion that defendants and his attorney had no knowledge of said judgment until several months after its entry, and that the attorney had relied on an oral promise of appellant's attorney to notify him when the cause was set for trial and that he received no such notification.

We need not consider the counter affidavit which denies the making of such promise. For a motion or petition of that character, made after the lapse of thirty days from entry of the judgment, can be entertained by the court only when it presents such a state of facts as would cause the judgment to be vacated by a bill in equity. (Section 21 of the Municipal Court Act; American Surety Co. v. [illegible], [illegible] Ill. [illegible].) No such state of facts is set forth in the affidavit or petition. Not only does it fail to show want of negligence on the part of the petitioner but it fails to set forth any of the elements of fraud, accident or mistake of which a court of equity would take cognizance.

Accordingly the order vacating the judgment will be reversed.

Reversed.

Gridley, P. J., and [illegible]

102 - 26758 (26758) (20542)

VIRGINIA ROBINSON, a minor, by GORDON WALTON, her next friend,

Appellee,

vs.

EMILE De RECAT, Inc.,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 644[3]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

August 14, 1920, appellee entered into a written contract with appellant to work for it as an entertainer at exhibitions or plays for a period of four weeks at the sum of $100 per week. The contract provided that either party might terminate it by giving "at any time after the date of opening of the play, two weeks' written notice." The play opened August 16. August 19th she notified defendant by telegram of her intention to terminate the contract, to take effect Sunday, September 5th. The evidence tends to show that she was discharged by defendant September 1st, about the middle of the third week's service, and that she was paid $40.70, the pro rata amount due for that week up to the time she was discharged. This suit was brought for the balance due for that week, and judgment was given therefor on the theory that defendant breached the contract. The evidence supports that theory, and judgment was entered for the unpaid salary for the rest of the week up to September 5th.

The only point made on this appeal is that the notice could not properly specify as the date for termination of the contract a date subsequent to the two weeks from the time it was given. There is nothing in this point. It is also contended that she did not tender her services after September 1st for the remainder of that week. She did not have to if she

VIRGINIA HOPKINSON, a minor,
by GORDON HOPKINS, her next
friend,

Appellee,

vs.

MARIE De MONET, Inc.,

Appellant.

APPEAL FROM
MULTNOMAH COUNTY
OF OREGON.

MR. JUSTICE MARKS DELIVERED THE OPINION OF THE COURT.

August 11, 1924, Appellee entered into a written contract with Appellant to work for it as an entertainer at exhibitions or plays for a period of four weeks at the rate of $100 per week. The contract provided that either party might terminate it by giving the other three days' notice of opening of the play, two weeks' written notice." The play opened August 1st. August 10th she received a telegram of her intention to terminate the contract, to take effect Sunday, September 9th. The evidence tends to show that she was dismissed by defendant September 1st, about the middle of the third week's service, and that she was paid $40.70, the pro rata amount due for that week up to the time she was discharged. This suit was brought for the balance due for that week, and judgment was given for the plaintiff for the remainder of that week. She did not have to fill the contract with the defendant by reason of the fact that the play was closed by the police. Appellant's theory that defendant breached the contract. The evidence supports that theory, and judgment was entered for the amount claimed in the complaint. This suit was brought for the balance

was discharged as the evidence tends to show. The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Merrill, J., concur.

was discharged as the evidence tends to show. The judgment will be affirmed.

AFFIRMED.

Bridley, P. J., and Morrill, J., concur.

(20354)

117 - 26774

JOHN CLARK,
Appellee,

vs.

DAVID H. WEITZENFELD,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 644

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit in forcible detainer for possession of premises occupied by appellant under a written lease for one year which terminated September 20, 1920.

The only question presented is whether there was an agreement for the extension of said lease on the claim of which defendant held over.

Defendant testified that on July 30th previous he had a conversation with plaintiff in regard to his continuing to live in the flat after the lease expired, and that plaintiff said that he would let him stay but would "have to raise the rent to $50" - the lease providing for a rental of $510 for the year payable in twelve installments of $42.50 each; that defendant said he was willing to pay it, and that plaintiff had said nothing to him since that time with regard to vacating the premises; that about the middle of August plaintiff asked him what he was going to do, and he said he was going to stay there and keep the flat, and plaintiff replied: "I have personally nothing against you; do not know anything against you."

This was all the testimony offered by defendant. It is insufficient to show that the minds of the parties met

Its insufficient to show that the weight of the preponderance

this was at the discretion of the jury.

against him."

"I have personally nothing to lose; so may God strengthen me to stick there but keep the lot, and certainly continue; still refer him that he is going to do, and he will be the vacating the premises; that was the effect of counsel pleading still had said nothing, to the effect that time was refused to that defendant said he was willing to pay it, and that plaintiff for the year 1929 in twelve instalments of £25.0s. each; the rent to 29th" - the Lords Justices left a period of 3/10 still could not be said let him stay but would "have to make to live in the flat after the time expired", and that plaintiff had a conversation with plaintiff in regard to his tenancies

Defendant certified that on July 5th previous he

an agreement for the extension of said lease on the 31st

of which defendant held over.

The only question presented to whether there was

one year which terminated September 29th 1930.

of premises occupied by plaintiff under a written lease for

This is a suit in ejectment for possession

IN THE JUSTICE COURT HOLDEN IN AND FOR CHEBOYGAN COUNTY.

DAVID H. WHITEMARSH,
Appellant.

vs.

JOHN CLARK,
Appellee.

) ON CHEBOYGAN.
)
) MUNICIPAL COURT
)
) APPEAL CASE
)

717 - 28774

in an agreement. Plaintiff neither agreed to accept, nor defendant to give, the specified increased rental nor for any particular time. If their minds met in an agreement for a lease for another year the contract came within the Statute of Frauds. But it is apparent from defendant's own testimony that there was no agreement that could be enforced against him or in his own favor. The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

in an agreement. Plaintiff neither agreed to accept, nor declined to give, the modified increased rental nor for any particular time. If their minds met in an agreement for a lease another year the contract came within the statute of frauds. But it is apparent from defendant's own testimony that there was no agreement that could be enforced against him or in his own favor. The judgment will be affirmed.

AFFIRMED.

Ortaley, P. J., and Merritt, J., concur.

123 - 26780

JAMES EDGAR BROWN,
Appellee,

vs.

CHARLES E. BARTLEY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 6451

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In this suit the plaintiff claimed that defendant owed him $199.32 for professional legal services rendered at defendant's request in filing objections before the Board of Review of Cook County, and in procuring a reduction of the taxes on defendant's real estate as assessed by the assessors. There is no question that plaintiff rendered the services and that if he is entitled to compensation therefor it is for the amount claimed and for which judgment was entered.

Plaintiff had previously rendered similar services for defendant. July 10, 1919, defendant wrote from Paris, France, to plaintiff saying that he had written to another lawyer by the name of Cochrane, to look after his taxes, but possibly the matter had been neglected, and requested plaintiff to attend to the same "on the same basis as before," if attention thereto had been neglected, and to do so "before it was too late, if defendant was not home." It appears that plaintiff sought to reach said Cochrane, and also defendant's wife, but was unable to get in communication with them. Two days before the time would expire under the statute for filing objections plaintiff went to the Board of Review to ascertain whether any had been filed. Learning that the fact could not be determined without a search through several thousand

be determined without a search through several thousand
whether any had been filed. Learning that the task would not
objections plaintiff went to the Board of Review to negotiate
days before the time would expire under the statute for filing
suit, but was unable to get in communication with them. Two
plaintiff sought to reach said Company, and also defendant's
was too late, if defendant was not home." It appears that
extension thereto had been applied, and to no effort it
to attend to the same "on the case basis as before," it
possibly the matter had been neglected, and requested plaintiff
leave by the name of Cochrane, to look after his taxes, but
Kranse, to plaintiff saying that he had written to another
for defendant. July 10, 1913, defendant wrote from Paris,
Plaintiff had previously rendered similar services
amount claimed and for which judgment was entered.
that it be is entitled to compensation therefor. It is for the
There is no question that plaintiff rendered the services and
taxes on defendant's real estate as assessed by the assessor.
Review of Cook County, and in procuring a reduction of the
defendant's removal in filing objections before the Board of
owed him $132.32 for professional legal services rendered at

In this suit the plaintiff claimed that defendant

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

CHARLES E. BARTLEY, Appellant.

vs.

JAMES BOYLE BROWN, Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

152 - 26750

objections already filed, he prepared objections, and a few days later receiving notice from the Board of Review to attend to the matter appeared before said Board and asked for, and procured, a reduction of the taxes. At that time defendant had not returned to America. It also appears that defendant's wife saw lawyer Cochrane, but he having learned from plaintiff that the latter had already filed objections and was going to take care of the matter did nothing further.

It is the claim of appellant that appellee deceived lawyer Cochrane into the belief that he had an arrangement with appellant to attend to the matter and that otherwise said Cochrane would have attended to the matter for appellant without charge. We do not think the evidence is capable of that construction, but think that conditions existed which entitled plaintiff to act for defendant pursuant to his request.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

days later receiving notice from the Board of Review to attend to the matter appeared before said Board and asked for, and procured, a reduction of the taxes. At that time defendant had not returned to America. It also appears that defendant's wife saw Lawyer Cochrane, but be busing learned from plaintiff that the latter had already filed objections and was going to take care of the matter did nothing further.

It is the claim of appellant that appellee deceived lawyer Cochrane into the belief that he had an arrangement with appellant to attend to the matter and that otherwise said Cochrane would have attended to the matter for appellant without charge. We do not think the evidence is capable of that construction, but think that conditions existed which entitled plaintiff to act for defendant pursuant to his request.

The judgment is affirmed.

MCALISTER.

Gridley, P. J., and Burnett, J., concur.

2057a

136 - 26794

ANNA S. ADAMS,
Appellant,

vs.

WALGREEN COMPANY,
a corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 645

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff became a patron of a store in which defendant sold ice cream, confections and soft drinks. She took off her hat, valued in her statement of claim at $15, which contained a jade pin, valued at $25, and laid the hat, as she claims, on the table where she was eating ice cream, and afterwards left the store without taking it. The next day she returned and made inquiry for the hat but it could not be found. Another witness corroborated her statement that the pin was in the hat when she laid it on the table.

A witness testified for defendant that she found the hat on the table and handed it to defendant's cashier, and at that time it had no pin in it; that there were quite a few people in the store at the time buying confections and drinks. The cashier testified that no pin was in it when it was handed to her, and that she laid the hat on top of a box and went to supper. When she returned it had fallen in the box and she then put it on the cigar counter at the side of her desk. She did not notice whether it was there when she left that night or not. It was where any person could reach and take it. There was some question as to the condition

136 - 36794

ANNA S. YOUNG,

Appellant,

vs.

NATIONAL CONTINENTAL
a corporation,

Appellee.

IN THE SUPREME COURT
OF OKLAHOMA.

MR. JUSTICE HARRISON DELIVERED THE OPINION OF THE COURT:

Plaintiff became a patron of a store in which defendant sold ice cream, confections and soft drinks. She took off her hat, valued in her statement of claim at $15, which contained a jade pin, valued at $25, and laid the hat, as she claims, on the table where she was eating ice cream, and afterwards left the store without taking it. The next day she returned and made inquiry for the hat but it could not be found. Another witness corroborated her statement that the pin was in the hat when he laid it on the table.

A witness testified for defendant that she found the hat on the table and handed it to [illegible] and at that time it had no pin in it; [illegible] a few people in the store at the time [illegible] drinks. The counter testified that a pin was in it when it was handed to her, and that she laid the hat on top of a hat and went to supper. When she returned it had fallen in the pot and she then put it on the right counter at the side of her desk. She did not notice whether [illegible] reach and take it. There was some question [illegible] the left that night or not. It was where any person could

of the hat but no evidence as to its value except that she paid $28 for it when new. The finding of the court was for the defendant.

At most under such a state of facts the delivery of the hat to appellee by the finder thereof could be considered only as a gratuitous bailment for the benefit of the owner, and in such a case the bailee would be required to exercise no more care in keeping it than it would exercise in the care of its own property of equal value, (Miles v. International Hotel Co., 289 Ill., 320) and the real question of fact raised is whether such care was exercised. We cannot say that the court erred in finding that it was, nor in reaching the conclusion that the hat pin was not in the hat when left in defendant's care. It was a second-hand hat and the evidence in regard to its condition would indicate that it was not of much value, and not such as would call for the exercise of unusual care and attention. The facts do not present a case where there is an invitation to the patron to lay down or leave the article, such as was presented in most of the cases cited by appellant.

The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

of the bat was no evidence as to its value except that she paid $25 for it when new. The finding of the court was for the defendant.

At most under such a state of facts the delivery of the bat to appellee by the finder thereof could be considered only as a gratuitous bailment for the benefit of the owner, and in such a case the bailee would be required to exercise no more care in keeping it than it would exercise in the care of its own property of equal value. (Bilse v. International Metal Co., 239 Ill., 320) and the rank question of fact raised in whether such care was exercised. We cannot say that the court erred in finding that it was, nor in rendering the conclusion that the bat was not in the hat when left in defendant's care. It was a second-hand bat and the evidence in regard to its condition would indicate that it was not of much value, and not such as would call for the exercise of unusual care and attention. The facts do not present a case where there is an invitation to the person to lay down or leave the article, such as was presented in most of the cases cited by appellant.

The judgment will be affirmed.

CONCUR.

Bridley, J., and Morrill, J., concur.

156 - 26815

EMILY D. DAY et al., doing business as Bennett-Day and Company,

Appellants,

vs.

REID, MURDOCK & COMPANY, a corporation,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 645

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

April 30, 1920, plaintiffs (appellants) filed their statement of claim in the Municipal Court alleging the acceptance by them of a previous offer by defendant to sell to them 1750 cases of ungraded muscatel raisins of the crop of 1919, at 23½¢ per pound, f. o. b., Chicago, to be paid for by sight draft with bill of lading attached; that a draft on plaintiff for $11, 168.38, the purchase price, was drawn and paid; that thereafter the shipment from defendant was received at New York; that on examination of the goods at that point defendant found that they were not in accordance with the agreement of sale; that they were not of the crop of 1919, nor of standard quality and were damaged; that "plaintiffs refused to accept said goods and demanded of defendant that it repay the purchase price, which defendant refused to do."

Plaintiffs further alleged that they had contracted to sell the goods called for in their agreement at a profit of $475.25 which they lost by reason of said default by defendant, wherefore plaintiffs claimed judgment for said purchase price and for the amount of said loss so sustained.

After defendant had filed its affidavit of merits plaintiffs on September 2, 1920, by leave of court filed an

MAIK D. DAY et al., doing business as Bennett-Day and Company,

Appellants,

vs.

MORRISPAR COUNTY OF CHICAGO,

ASPHAL PROM

KNIG, MORROCK & COMPANY, a corporation,

Appellee.

MR. JUSTICE ZAGMAN DELIVERED THE OPINION OF THE COURT.

April 30, 1930, plaintiffs (appellants) filed their statement of claim in the municipal Court alleging the conveyance by them of a previous offer by defendant to sell to them 1750 cases of undersized matches of the crop of 1919, at 33½ per pound, f. o. b., Chicago, to be paid for by night draft with bill of lading attached; that a draft on plaintiff for $11, 108.33, the purchase price, was drawn and paid; that thereafter the shipment from defendant was received at New York; that on examination of the goods at that point defendant found that they were not in accordance with the agreement of sale; that they were not of the crop of 1919, but of standard quality and were damaged; that "plaintiff's refused to accept said goods and demanded of defendant that it repay the purchase price, which defendant refused to do."

Plaintiffs further alleged that they had contracted to sell the goods called for in their agreement of a profit of $417.25 which they lost by reason of said default by defendant, wherefore plaintiffs claimed judgment for said purchase price and for the amount of said loss as anticipated.

After defendant had filed its affidavit of merits plaintiffs on September 3, 1930, by leave of court filed an

amended statement of claim which differed from the original by adding thereto that by reason of defendant's refusal to accept the goods plaintiffs were obliged to sell them for the best price obtainable, which was $9,201.20, and to pay certain enumerated charges amounting to $1,378.06, "thereby occasioning a loss to the plaintiffs by reason of the defendant's breach of said warranty in said agreement in the amount of $3,233.46," wherefore plaintiffs prayed for judgment for the last named amount, and $475.25, a total of $3,708.71.

On defendant's motion the court struck the amended statement from the files on the ground that it was insufficient, and dismissed the suit. As under the rules of the Municipal Court such motion performed the function of a demurrer this appeal presents the question whether the amended statement of claim states a cause of action within any of the remedies provided for in the Uniform Sales Act, Hurd's R. S. Chap., 121a, sec. 69, which provides:

> (1) Where there is a breach of warranty the buyer may, at his election:
> (a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.
> (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.
> (c) Refuse to accept the goods, if the property therein has not passed and maintain an action against the seller for damages for the breach of warranty.
> (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.
> (2) When the buyer has claimed and been granted a remedy in any one of these ways no other remedy can thereafter be granted.
>
> * * * *
>
> (4) "Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof

amended statement of claim which differed from the original by adding thereto that by reason of defendant's refusal to accept the goods plaintiffs were obliged to sell them for the best obtainable price, which was $9,201.90, and to pay certain enumerated charges amounting to $1,378.06, thereby occasioning a loss to the plaintiffs by reason of the defendant's breach of said warranty in said agreement in the amount of $3,339.46." Wherefore plaintiffs prayed for judgment for the last named amount, and $478.09, a total of $3,708.73.

On defendant's motion the court struck the amended statement from the files on the ground that it was insufficient, and dismissed the suit. As under the rules of the municipal Court such motion performed the function of a demurrer this appeal presents the question whether the amended statement of claim states a cause of action within any of the remedies provided for in the Uniform Sales Act, Burd's R. . . Chap., 121a, sec. 69, which provides:

> (1) Where there is a breach of warranty the buyer may, at his election:
> (a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.
> (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.
> (c) Refuse to accept the goods, if the property therein has not passed and maintain an action against the seller for damages for the breach of warranty.
> (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.
> (2) When the buyer has claimed and been granted a remedy in any one of these ways no other remedy can thereafter be granted.

* * * *

> (4) "Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cause to return the goods. If the price or any part thereof to be liable for the price upon receiving or offering

has already been paid, the seller shall be liable to repay so much thereof as has been paid concurrently with the return of the goods or immediately after an offer to return the goods in exchange for repayment of the price.

(5) 'Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold as bailee for the seller * * * ' subject to a lien to secure the repayment of the price paid, which can be enforced only by a sale of the goods as provided in Sec. 53 of the Sales Act."

Appellee contends that the original statement of claim is predicated upon a rescission of the contract, that the amended statement is inconsistent therewith, that appellants elected by the original statement to adopt the remedy for a rescission, and therefore "no other remedy can thereafter be granted" because under sub-section 2 of section 69, when the buyer has claimed and been granted a remedy in any one of the ways provided for in section 69 as aforesaid, "no other remedy can thereafter be granted." The difficulty with appellee's proposition is a misapprehension, we think, of what is meant by the words "granted a remedy" as used in said sub-section 2. One can hardly be said to have claimed and been granted a remedy until the right to one of the statutory remedies has been exercised, and we apprehend that when a suit becomes necessary for that purpose that he cannot be said to have been "granted" his remedy until the claim made in the suit has been in some way disposed of. It would be inconsistent with the right to amendment to say that a party must be precluded from changing the theory of his right to relief.

But in neither the original nor the amended statement of claim do plaintiffs plead facts constituting a rescission of the contract or the right to relief upon that theory, as provided for by statute. Section 69 (1), (d) provides that upon rescission of the contract where the goods have already been

has already been paid, the seller shall be liable to repay so much thereof as has been paid upon currently with the return of the goods or immediately after an offer to return the goods in exchange for replacement of the price.

(3) 'Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold as bailee for the seller * * * ' subject to a lien to secure the repayment of the price paid, which can be enforced only by a sale of the goods as provided in Sec. 85 of the Sales Act."

Appellee contends that the original statement of claim is predicated upon a rescission of the contract, that the amended statement is inconsistent therewith, that appellants elected by the original statement to adopt the remedy for a rescission, and therefore "no other remedy can thereafter be granted" because under sub-section 3 of section 69, when the buyer has claimed and been granted a remedy in any one of the ways provided for in section 69 as aforesaid, "no other remedy can thereafter be granted." The difficulty with appellee's proposition is a misapprehension, we think, of what is meant by the words "granted a remedy" as used in said sub-section 3. One can hardly be said to have claimed and been granted a remedy until the right to one of the statutory remedies has been exercised, and we apprehend that when a suit becomes necessary for that purpose that he cannot be said to have been "granted" his remedy until the claim made in the suit has been in some way disposed of. It would be inconsistent with the right to maintenance of his right to rescind that upon the pendency of a suit for rescission the contract or the right to relief upon that theory, as provided for by statute. Section 69 (3). (a) provides that upon rescission of the contract where the goods have already been

received the buyer must "return them or offer to return them to the seller" in order to recover the price which has been paid. There are no allegations to that effect in either of the statements of claim. Such averments were essential to present a case of rescission of the contract. The allegations in the statements of claim that "plaintiffs refused to accept the goods" are of no avail when the facts pleaded indicate the contrary. It appears from other allegations that plaintiffs received the goods, paid for them and later sold them. Had plaintiffs offered to return them to the seller and the latter had refused to accept the offer they might under sub-section 5 aforesaid have held the goods as bailee for the seller subject to a lien to secure the repayment of the purchase price. But having failed, as must be inferred from the absence of allegations, to that effect, to offer to return the goods, the relationship of bailee did not exist and the sale of the goods by plaintiffs was an exercise of ownership thereof. Plaintiffs, therefore, were relegated to the remedy provided for in sub-section (1) (b) upon which the amended statement of claim seems to be predicated. As so amended the statement of claim on the facts pleaded showed an acceptance as aforesaid and proceeds upon that theory in the averments as to the damages sustained for the breach of warranty.

We think, therefore, that it was error to strike the amended statement of claim. While, of course, some of its allegations as referred to are inconsistent with facts pleaded showing an acceptance of the goods, yet it would be unjust to deprive plaintiffs of all right of action because of such technical inconsistency.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

received the buyer must "return them or elect to return them
to the seller" in order to recover the price which has been
paid. There are no xxxxxx allegations to that effect in either
of the statements of claim. Such statements were essentially to
present a case of rescission of the contract. The allegations
in the statements of claim that "plaintiffs refused to accept
the goods" are of no avail when the facts pleaded indicate the
contrary. It appears from other allegations that plaintiffs
received the goods, paid for them and later sold them. Had
plaintiffs offered to return them to the seller and the latter
had refused to accept the offer they might under sub-section
5 aforesaid have held the goods a pledge for the seller sub-
ject to a lien to secure the repayment of the purchase price,
but having failed, as must be inferred from the absence of
allegations, to the contrary, to offer to return the goods, the
relationship of pledge did not exist and the sale of the goods
by plaintiffs was an exercise of ownership thereof. Plaintiffs,
therefore, were relegated to the remedy provided for in sub-
section (1) (b) upon which the amended statement of claim seems
to be predicated. As no amended statement of claim on the
basis pleaded showed an acceptance or interpretation and proceeds upon
that theory in the averments as to the damages sustained for the
breach of warranty.

I think, therefore, that it was error to strike the
amended statement of claim. While, of course, some of its
allegations as referred to are inconsistent with their pleaded
showing an acceptance of the goods, yet it would be unjust to
deprive plaintiffs of all rights of action because of such

The judgment will be reversed and the cases remanded.

Critchley, J. J., and Morrell, J., concur.

162 - 26821

DAN RADICE,
Appellee,

vs.

THEODORE KARAWIDAS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

223 I.A. 645

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee made a contract to build a barn for appellant for the sum of $1350. He brought this action claiming a balance due on said contract of $143 and $493.60 for extras furnished at appellant's request. The jury returned a verdict for $477.30 in plaintiff's favor and judgment was entered thereon.

On appeal defendant urges that plaintiff did not complete his contract and that defendant did not ask or contract for said extras. The evidence on these matters is conflicting and in some parts irreconcilable. It would be extremely difficult to attempt to analyze the same, as neither of the parties nor their witnesses could speak English very well, and all their testimony as transcribed is not perfectly intelligible. But from our review of the same as abstracted we cannot say that the verdict was against the manifest weight of the evidence. It was of such a character that the jury, who saw and heard the witnesses, were in a much better position to determine where the truth lay as to the matters in dispute than we are. Neither of the parties produced or kept an accurate or businesslike account of their mutual transactions. If the jury believed plaintiff's testimony, which is supported by some corroborating circumstances and some admissions by defendant, it was sufficient to sustain the verdict.

We find no reversible error in the court's rulings and do not feel justified in reversing the judgment or requiring a remittitur.

AFFIRMED.

Gridley, P.J., and Morrill, J., concur.

26862

202 - 26862

ELIZABETH BREDIN,
Appellee,

vs.

MARTIN LARSON,
Appellant.

Appeal from Circuit Court
of Cook County.

223 I.A. 645

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $250.00 entered on a verdict for that sum in an action for false imprisonment. On a review of the evidence we think the verdict was manifestly against the weight of the evidence and that it should have been for defendant.

Plaintiff had bought and paid for a pair of shoes from defendant and on the occasion in question took them back to his store and sought to have her money refunded. She arrived there about 5:30 p. m., defendant's closing time. Defendant was still there but engaged with two customers. All of his employes, a dozen or so, had left except his lady cashier and a lady clerk. The two young ladies had on their hats and were about to leave the place. Plaintiff declined to be waited on by them, was told defendant was busy in his private office, that it was the closing hour, but she took off her hat, sat down, and insisted on seeing defendant, saying she wanted her money back. The two ladies left almost immediately and in a short time the two customers followed. Plaintiff then went into defendant's private office and demanded back her money. He said it was not his habit to return money on purchases; that it was his closing time; that his cashier had gone; that he wished to catch a train home and asked her to come at another time. She refused to leave without her money even when he requested her to do so. She remained seated and said she would

No. 25802

MILDRED MERRIN,

Appellee,

vs.

MARTIN JARDEN,

Appellant.

Appeal from Circuit Court of Cook County.

MR. JUSTICE MADDEN DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $250.00 entered on a verdict for that sum in an action for false imprisonment. On a review of the evidence we think the verdict was manifestly against the weight of the evidence and that it should have been for defendant.

Plaintiff had bought and paid for a pair of shoes from defendant and on the occasion in question took them back to his store and sought to have her money refunded. She arrived there about 8:30 P. M., defendant's closing time. Defendant was still there but employed with two exceptions. All of his employes, a dozen or so, had left except his lady cashier and a lady clerk. The two young ladies had on their hats and were about to leave the place. Plaintiff declined to be waited on by them, was told defendant was busy in his private office, that it was too close home, but she took off her hat, sat down, and insisted on seeing defendant, saying she wanted her money back. The two ladies left almost immediately and in a short time the two customers followed. Plaintiff then went into defendant's private office and demanded back her money. He said it was not his habit to return money on purchases, that it was his closing time; that his cashier had gone; that he wished to catch a train home and asked her to come be requested her to do. She remained seated and said she would not another time. She returned to leave with her money when

stay there until midnight if she did not get her money. He then went out of the front door and walked in front of the store waiting for a night watchman to appear, when in a few minutes a policeman came, followed shortly by another. They had come in response to her telephoning to the police station. He informed them of the situation and took them into the store. She then charged that he had locked the door upon her, and he denied it. The officers testified that she also declared she would stay there until midnight for her money, but on their suggestion defendant gave her a receipt and they all left the store.

She was her only witness. On the material elements of the case as to her demeanor, her declared intention to remain there, her refusal to leave when requested to do so, and on other matters, she was contradicted by the defendant, the two young ladies, one of whom was no longer in defendant's employ, and the two police officers. The two young ladies testified to the facts as above stated that took place in their presence before they left the store, which, with the testimony of defendant and the police officers as to the subsequent incidents and her defiant attitude and conversation, together with her own admissions upon the witness stand, leave no doubt in our minds as to where the preponderance of the evidence lies. It clearly substantiates defendant's claim that on the occasion in question she arrived at the closing hour, was politely requested to come at another time, and refused to leave the store even when so requested, and that she was not locked therein as she claimed. Under such circumstances she was not there by invitation but was a trespasser, and was not held or detained there forcibly or against her will.

That defendant had a right to insist upon her leaving the store at the closing hour cannot be questioned. It was said in Woodman v. Howell, 45 Ill. 367, 370:

held in Woodman v. Russell, 40 Ill. App. 1891:

"If one at the floating point runs out he overstayed. If one
who was not there by invitation [illegible] was not
was not invited to leave [illegible] who
refused to leave [illegible] to make it a police case, and
placing hour, was politely requested to make it a police case, and
man's claim that on the occasion the assault at the
commencement of the witness [illegible]. If [illegible] defend-
ant have no doubt in our minds we to give the pre-
ference and conversation, together with her own [illegible] upon the
police officers on [illegible] the endurance [illegible] at
last the store, which, with the testimony of defendant and the
an hours started what took place in their presence [illegible]
the police officers. The two [illegible] added to the facts
ladies, and of whom was to longer in defendant's employ, and the
waiter, who was contradicted by the defendant, the two young
above, but refused to leave [illegible] to do so, and on other
the case as to her character, was objected [illegible] to certain
[illegible] was her only witness. On the material grounds of
there until midnight for her money, but on their suggestion de-
fendant gave her a receipt and they all left the store.

The officers testified that she also declared the would stay
that she had locked the door upon her, and to caution it.
them of the attention and took them into the store. She then
threatened to her telephoning to the police station. He returned
policeman came, followed shortly by another. They had come in
ing for a night watchman to appear, when in a few minutes a
ment out of the front door and walked in front of the store wait-
may there until midnight if she did not put her money. He then

> "The very fact that a professional man or merchant or other person, opens an office to transact business with and for the public, no doubt is a tacit invitation to all persons having business with him, and a permission to others to enter, unless forbidden. But he does not lose his control over it, or the right to prevent whom he pleases to enter, and to require any or all persons to depart, after they have once entered."

Accordingly as the verdict was manifestly against the weight of the evidence the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

"The very fact that a punishment may or may not
or other person, opens an office to numerous business with
and for the public, no doubt is a tacit invitation to all
persons having business with him, and a permission to others
to enter, unless forbidden. But he does not lose his control
over it, or the right to prevent what he pleases to enter,
and to require any or all persons to depart, after they have
once entered."

Accordingly as the verdict was manifestly against the
weight of the evidence the judgment will be reversed with a find-
ing of fact.

REVERSED WITH FINDING OF FACT.

Oxley, J., and Merrill, C., concur.

FINDING OF FACT.

We find that appellee, Elizabeth Bredin, was not detained or imprisoned in the private office or store of appellant, Martin Larson, forcibly or against her will as alleged in her statement of claim.

He filed this application, Nineteen Dollar, was set de-
tained or imprisoned in the private office or store of Chapiou,
Martin Larson, Corinth or whatnot per will be signed in her
statement of claim.

37 - 26539

IRENE B. WOOLF, Executrix of the Estate of Alfred E. Woolf, Deceased,

Appellee,

vs.

R. GOTTLIEB,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 646

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago for $1638.50 in favor of plaintiff, who is appellee here, and against defendant, who is the appellant.

The statement of claim alleges that plaintiff's claim is for money due upon a certain promissory note executed by defendant for the sum of $1500, dated December 3, 1918, payable January 31, 1919, and delivered to plaintiff, who is the legal owner thereof, and that there is due plaintiff the sum of $1500 with interest thereon from the date of the note, a copy of which is attached to the statement of claim.

The original affidavit of merits denied any indebtedness upon the note and averred that said note was executed in conformity with a certain written agreement signed by plaintiff and bearing the same date as the note. This agreement is in the form of a letter from plaintiff to defendant and is as follows:

"In consideration of your giving me your note for fifteen hundred dollars ($1500.00) due January 31, 1919, I hereby agree to accept the return of some merchandise which you purchased from Alfred E. Woolf Co. and should I sell this merchandise for the same price plus any expenses and interest before January 1st, 1919, I will return to you the fifteen hundred dollar note ($1500) or give you credit for prorata amount if you instruct me or my agent to sell to some one at a loss. If we cannot sell before the 1st of January, 1919, I am to have the privilege to sell to the highest bidder for cash after receiving offers from a few dealers and any loss sustained by me in selling the portion un-

IRENE D. WOOLF, Executrix of the Estate of Alfred K. Woolf, Deceased,

Appellee,

vs.

R. GOTTLIEB,

Appellant.

ABSTRACT FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MORRILL DELIVERING THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago for $1023.50 in favor of plaintiff, who is appellee here, and against defendant, who is the appellant.

The statement of claim alleges that plaintiff's claim is for money due upon a certain promissory note executed by defendant for the sum of $1500, dated December 3, 1919, payable January 31, 1920, and delivered to Jarnutt, who is the legal owner thereof, and that there is due plaintiff the sum of $1500 with interest thereon from the date of the note, a copy of which is attached to the statement of claim.

The principal affidavit of merits to this suit sets forth substantially the execution of the note and execution of same upon defendant. This statement is in the form of a letter from plaintiff to defendant, and is as follows:

"In consideration of your giving me your note for fifteen hundred dollars ($1500.00) due January 31, 1920, I have this day accepted the same price plus one exchange and interest before from Jarnutt for Alfred K. Woolf Co. and will hold the notes for my account to sell to some one at a loss. If no one of mail before the 1st of January, 1920, I am to have the privilege to mail to me the highest bidder for cash after deducting from the proceeds of five per cent commission if you desire it, the option and any loss sustained by me in selling the notes and any profit over and above the $1500.00 and interest thereon is to be mine. Please write me at once if you will accept this proposition."

sold is to be paid by you to me in cash as soon as sale is made. The yardage as invoiced by you and marked by your examiner is to be guaranteed by you.

This agreement is signed in the presence of
Witness ALFRED E. WOOLF.

The following is a part of the above agreement.

If you cooperate with me or my agent & buy a fair portion of these woolens for cash in December I leave it to Mr. Gorman to decide upon extending the period not to be later than Jany. 31st, to sell to highest bidder."

The last paragraph of the original affidavit alleged a failure of consideration by reason of the non-compliance of plaintiff with the terms of this agreement. On June 3, 1920, the last paragraph of the affidavit of merits was stricken from the files and defendant granted leave to amend within five days.

The last amended affifavit of merits, filed on June 15, 1920, denies any indebtedness upon the note in question and alleges that there was no consideration for said note. This affidavit was stricken from the files by order of court and a motion for leave to file an amended affidavit of merits denied. Thereupon judgment by default for want of an affidavit of merits was entered against defendant on June 17, 1920, from which this appeal was prayed and allowed. On July 7, 1920, the appeal bond was presented and approved by the court.

A petition to vacate this judgment and an amended petition for the same purpose were filed on June 30, 1920, and July 9, 1920, respectively. This petition was denied on July 17, 1920, for the reason that the approval of the appeal bond deprived the trial court of any jurisdiction to consider the amended petition to vacate or to enter any further order in the case. To review this ruling of the trial court a writ of error has been issued and is now pending in this court as case No. 26699, which has been consolidated for hearing with this case.

As we view the controversy, the only question before us for determination is whether or not the last amended affidavit of

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In no view the controversy, the only question before us

hearing with this case.

ing in this court me came Jo. 86629. Nine are been considered fe-

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or to enter any further order in the case. To review this ruling

court of any jurisdiction to consider the a ended ac tion to vacate

the reason that the approval of the appeal bond deprived the trial

1920, respectively. This petition was denied on July 17, 1920, for

tition for the same purpose were filed on June 5, 1920, and July 9,

petition to vacate this judgment and a amended pe-

by the court.

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lowed. On June 17, 1920, from which order this appeal was prayed and al-

fendant on June 17, 1920, from which order this appeal was prayed and al-

default for want of an affidavit of merits was entered against de-

1920, double any judgments upon the note in question and allowed

that there was no consideration for said note. This affidavit was

stricken from the files by order of court and a motion for leave to

file an amended affidavit of merits denied. Thereupon judgment by

fendant granted leave to amend within five days.

The last amended affidavit of merits, filed on June 15,

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with the terms of this agreement. On June 3, 1920, the last para-

failure of consideration by reason of the non-compliance of plaintiff

The last paragraph of the original affidavit alleged a

man to decide upon extending the period not to be later than July.
Star, to call to Highest bidder."

tion of these motions for each in December I leave it to Mr. Dor-
If you cooperate with me or my agent I buy a fair per-

The following is a part of the above agreement.

Witness CLARK R. WOOLF.

This agreement is signed in the presence of

to be guaranteed by you.

The yardage as invoiced by you and marked by your examiner is

need is to be paid by you to me in cash as soon as sale is made.

merits above mentioned, in connection with that portion of the original affidavit of merits which was not stricken from the files, stated a good defense to the action. This affidavit alleged want of consideration for the note and must be considered by itself without reference to the allegations of the former affidavits, except that portion of the original affidavit which was not stricken. Undoubtedly an affidavit of merits is sufficient if it sets up a good defense to the whole of plaintiff's claim and specifies the nature of such defense. Prindle v. Sanders, 207 Ill. App. 99; Muller v. Walensky, 204 Ill. App. 352. Defendant is not obliged to plead evidentiary facts in his affidavit. Shimeall v. Lehman, 198 Ill. App. 29.

We are of the opinion that the last amended affidavit of merits, alleging a want of consideration for the note, together with that portion of the original affidavit not stricken, stated a good defense. (Negotiable Instrument Laws R. S. chap. 98, sec. 28), and that the court erred in striking the same from the files. It is therefore unnecessary for us to consider other questions discussed in the briefs of counsel.

The judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

56 - 26699

IRENE B. WOOLF, Executrix of the Estate of Alfred E. Woolf, Deceased, Defendant in Error.

vs.

R. GOTTLIEB, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

233 I.A. 646

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This case is consolidated for hearing with case No. 26539 in which an opinion has been filed on this date. The order reversing and remanding the former case renders the present proceeding unnecessary. Therefore we shall not consider in detail the questions involved herein, which involve the ruling of the trial court upon a petition to vacate the judgment which has been reversed by the opinion in case No. 26539.

The writ of error is dismissed.

WRIT DISMISSED.

Gridley, P. J., and Barnes, J., concur.

Certiorari denied

399 - 26573

ARTHUR D. LORD,
Appellee,

vs.

J. D. SHATFORD,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 646

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago to recover commissions alleged to be due him upon the sale of certain oil property owned by defendant. There was a trial by the court without a jury, resulting in a finding and judgment for $25,218 in favor of plaintiff, who is appellee here.

Plaintiff's claim for these commissions is based upon the following letter, dated May 12, 1917, from defendant to plaintiff:

> "In the event that I make a sale of my refinery, tank cars, distributing stations, oil wells and equipment to the Barnett Oil & Gas Co., for $750,000 under a contract which shall provide for final payment within two years from May 30th, 1917, I, or in case of my death, my legal representatives, will pay you a commission of three per cent on the said sale price, for your services as the broker in the deal, to be paid to you in cash whenever I shall have received full payment for said property and pass title. I will advise you of the payments so made."

The evidence shows that plaintiff was the procuring cause of the sale. He brought the parties together. The sale was made to the Barnett Oil and Gas Company on or about May 12, 1917, for the sum of $750,000, payable in three instalments of $250,000 each, on January 1, 1918, July 1, 1918 and January 1, 1919, respectively, evidenced by the notes of the purchaser for these amounts. Afterwards some payments were made on these notes and some cash advances were made by defendant to purchaser, so that in January, 1918, the Barnett Oil & Gas Company

ARTHUR D. IORD,
Appellee.

vs.

I. D. SHAFFORD,
Appellant.

MUNICIPAL COURT
OF CHICAGO.

APPEAL FROM

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago to recover commissions alleged to be due him upon the sale of certain oil property owned by defendant. There was a trial by the court without a jury, resulting in a finding and judgment for $25,218 in favor of plaintiff, who is appellee here.

Plaintiff's claim for these commissions is based upon the following letter, dated May 12, 1917, from defendant to plaintiff:

> "In the event that I make a sale of my refinery, tank cars, distributing stations, oil wells and equipment to the Burnett Oil & Gas Co., for $250,000 under a contract which shall provide for final payment within two years from May 20th, 1917, I, or in case of my death, my legal representatives, will pay you a commission of three per cent on the said sale price, for your services as the broker in the deal. to be paid to you in cash whenever I shall have received full payment for said property and deed title. I will advise you of the payments so made."

The evidence shows that plaintiff was the procuring cause of the sale. He brought the parties together. The sale was made to the Burnett Oil and Gas Company on or about May 12, 1917, for the sum of $250,000, payable in three instalments of $250,000 each, on January 1, 1918, July 1, 1918 and January 1, 1919, respectively, evidenced by the notes of the purchaser for these amounts. Afterwards some payments were made on these notes and some small advances were made by defendant to pur-

was indebted to defendant in the sum of $604,000. At that time a settlement was made between defendant and the Barnett Oil & Gas Company, whereby the three notes of $250,000 each were surrendered to said company by defendant, who accepted new notes of the Barnett Oil & Gas Company for the entire balance then unpaid, amounting to $604,000, and thereupon conveyed the property to the purchaser. These notes were secured by a trust deed upon the property mentioned and also a second mortgage upon property in Kentucky, the description of which is not furnished. These facts are undisputed except that there is some controversy as to the exact date of the original notes for $250,000 each.

The record does not show the number, date, amount or date of maturity of the notes secured by the trust deed or mortgage of January, 1918, although defendant thinksthere were thirty-six of them. Defendant testified that the settlement of January, 1918, was made necessary on account of the inability of the Barnett Oil & Gas Company to meet its obligations, which is not disputed by plaintiff. The record is not clear as to what payments were made upon the new notes given in connection with the settlement of January, 1918. The only evidence as to their final disposition is contained in the testimony of defendant, who says that he transferred all of his interest in these notes. The date, terms and conditions of the transfer, as well as the name of the transferee, are not mentioned. No propositions of law or fact were submitted to the trial court and none were held or refused.

Appellant contends that appellee is not entitled to the commission mentioned in the letter of May 12, 1917, for the reason that defendant has not received full payment for the property, it being admitted that he has passed the title

was indebted to defendant in the sum of $804,000. At that time a settlement was made between defendant and the Burnett Oil & Gas Company, whereby the three notes of $320,000 each were surrendered to said company by defendant, who accepted new notes of the Burnett Oil & Gas Company for the entire balance then unpaid, amounting to $804,000, and thereupon conveyed the property to the purchaser. These notes were secured by a trust deed upon the property mentioned and also a second mortgage upon property in Kentucky, the description of which is not furnished. These facts are undisputed except that there is some controversy as to the exact date of the original notes for $320,000 each.

The record does not show the number, date, amount or date of maturity of the notes secured by the trust deed or mortgage of January, 1918, although defendant thinks/there were thirty-six of them. Defendant testified that the settlement of January, 1918, was made necessary on account of the inability of the Burnett Oil & Gas Company to meet its obligations, which is not disputed by plaintiff. The record is not clear as to what payments were made when the new notes given in consideration with the settlement of January, 1918. The only evidence as to their final disposition is contained in the testimony of defendant, who says that he transferred all of his interest in these notes. The date, terms and conditions of the transfer, as well as the name of the transferee, are not mentioned. No proposition of law or fact were submitted to the trial court and none were held or refused.

Appellant contends that appellee is not entitled to the commission mentioned in the letter of May 15, 1917, for the reason that defendant has not received full payment for the property. It being admitted that he has passed the title

thereto. It is urged by appellant that the acceptance of the new notes of the Barnett Oil & Gas Company in January, 1918, in settlement of its existing indebtedness for the balance due on the original notes and for advances made by defendant did not constitute payment of the original notes and did not render plaintiff's claim for commissions due and payable.

It has been held repeatedly that the acceptance by a creditor of notes of his debtor in lieu or in extension of former notes does not necessarily constitute payment of the former notes. (Wilhelm v. Schmidt, 84 Ill., 183; Walsh v. Lennon, 98 Ill. 27), but it is equally well settled that the giving of a new note accompanied by the surrender of the old note is prima facie payment of the original debt (Trego v. Estate of Cunningham, 267 Ill. 375; Yates v. Valentine, 71 Ill., 643.) Whether or not there was a satisfaction of the old debt depends upon the intention of the parties and is a question for the jury to determine. Boulter v. Joliet Nat. Bank, 295 Ill., 594; Jansen v. Grimshaw, 125 Ill., 468.

A fair construction of the agreement contained in the letter of May 12, 1917, indicates that it was the intention of defendant not to convey the property until payment therefor had been made in full and that passing of the title should be dependent upon such payment. Defendant says he so understood the agreement. It is admitted that defendant conveyed and passed title to the property to the Barnett Oil & Gas Company in January, 1918, in consideration of a settlement of the existing indebtedness of said company, which must be presumed to have been satisfactory to defendant. In the absence of any proof of the contrary intention of the parties, we are of the opinion that the notes which defendant then received, coupled with the conveyance of the property which he then made, indicate

with the conveyance of the property which he then made, indicate opinion that the notes which defendant then received, coupled proof of the contrary intention of the parties, we are of the to have been satisfactory to defendant. In the absence of any existing indebtedness of said company, which must be presumed in January, 1910, in consideration of a settlement of the passed title to the property to the Barnett Oil & Gas Company the agreement. It is admitted that defendant conveyed and depended upon such payment. Defendant says he so understood had been made in full and that passing of the title should be the letter of May 12, 1911, indicates that it was the intention of defendant not to convey the property until payment therefor question for the jury to determine. Moulton v. Joplin Nat. Bank, 208 Ill., 384; Duncan v. Chrisman, 148 Ill., 462.

A fair construction of the agreement contained in

thereto. It is urged by appellant that the acceptance of the new notes of the Barnett Oil & Gas Company in January, 1910, in settlement of the existing indebtedness for the balance due on the original notes and for advances made by defendant did not constitute payment of the original notes and did not render plaintiff's claim for commissions due and payable.

It has been held repeatedly that the acceptance by a creditor of notes of his debtor in lieu or in extension of former notes does not necessarily constitute payment of the former notes. (Kilbrix v. Schmidt, 94 Ill., 183; Tulan v. Lennon, 98 Ill. 27). But it is equally well settled that the giving of a new note accompanied by the surrender of the old note is prima facie payment of the original debt (Trego v. Estate of Cunningham, 187 Ill. 378; Yates v. Valentine, 71 Ill., 643.) Whether or not there was a satisfaction of the old debt depends upon the intention of the parties and is a

that said notes constituted such a payment of the original debt as to render defendant liable for the commissions claimed by plaintiff. This is especially true in view of the fact that defendant, who testified on behalf of plaintiff, as well as his own behalf, failed to disclose either the exact amount of payments made on the notes given in January, 1918, or the consideration received by him for their transfer.

The finding and judgment of the trial court were justified by the law and evidence; therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

that said notes constituted such a payment of the original debt as to render defendant liable for the commissions claimed by plaintiff. This is especially true in view of the fact that defendant, who testified on behalf of plaintiff, as well as his own behalf, failed to disclose either the exact amount of payments made on the notes given in January, 1918, or the consideration received by him for their transfer.

The finding and judgment of the trial court were justified by the law and evidence; therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Burnes, J., concur.

402 - 26576

OAKLAND MOTOR CAR COMPANY,
a corporation,
Appellee,

vs.

FLYNN AUTO LIVERY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 6467

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is appellee here, brought an action of replevin to determine its right to the possession of a certain automobile. There was a trial before the court without a jury, resulting in a finding of the right of property in plaintiff and assessing plaintiff damages at the sum of $650. Judgment was entered upon the finding and an appeal prayed and allowed. A reversal is sought upon the ground that the judgment is contrary to the law and the evidence and that the damages were excessive.

A statement of claim was filed by plaintiff which alleges in substance that on December 31, 1917, defendant wrongfully took the property of plaintiff, consisting of one Model 34B Oakland limousine automobile with complete equipment and unjustly detained the same. The affidavit of merits denies these allegations and alleges that the automobile in question was the property of defendant and alleges that plaintiff unlawfully took possession of the same on January 17, 1918.

The evidence shows that there had been some telephone conversations between the assistant general manager of the plaintiff and one Barney Flynn representing the defendant, in which the former had told the latter that the car was ready for delivery and requesting Mr. Flynn to come down and get it

402 - 20370

OAKLAND MOTOR CAR COMPANY,
a corporation,

Appellee,

vs.

PLYMS AUTO PLATES,
a corporation,

Appellant.

APPEAL FROM
SUPERIOR COURT
OF CHICAGO.

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is appellee here, brought an action of replevin to determine its right to the possession of a certain automobile. There was a trial before the court without a jury, resulting in a finding of the right of property in plaintiff and awarding plaintiff damages at the sum of $850. Judgment was entered upon the finding and an appeal prayed and allowed. A reversal is sought upon the ground that the judgment is contrary to the law and the evidence and that the damages were excessive.

A statement of claim was filed by plaintiff which alleges in substance that on December 21, 1917, defendant wrongfully took the property of plaintiff, consisting of one Model 34B Oakland limousine automobile with complete equipment and uniquely defaced the same. The affidavit of merits denies these allegations and alleges that the automobile in question was the property of defendant and alleges that plaintiff unlawfully took possession of the same on January 17, 1918. The evidence shows that there had been some telephone conversations between the resistant General Manager of the plaintiff and one Barney Allen representing the defendant. In which the former had told the latter that the car was ready for delivery and requesting Mr. Allen to come down and get it

and bring with him $1399.91 in payment therefor. Mr. Flynn replied that he was very busy and asked the assistant manager to deliver the car, which the latter agreed to do, although it was contrary to the rules of his company to deliver a car without payment therefor. The assistant manager told Flynn that he would have the car delivered by a salesman named Jackson, through whom it had been bought. Jackson's testimony shows that he delivered the car at the Flynn Auto Livery. He was accompanied by a mechanic who drove the car. Upon their arrival Mr. Flynn offered him a check for about $1100 in payment for the car, which he declined to accept. The car was then inside the Flynn garage. Jackson told Flynn that he would be obliged to take the car back to plaintiff's place of business if he could not get the payment which he had been directed to collect. He attempted to get into the car and drive it from the garage but was forcibly prevented from so doing by the agents and employes of defendant. Afterwards he went to the garage with the bailiff who had the replevin writ and took the car away under the protection of the bailiff, who kept the servants of the Flynn Company from forcibly preventing its removal. This evidence is undisputed except that there is some controversy as to whether or not actual violence was used or threatened on the occasions mentioned.

It appears from defendant's testimony that on December 11, 1917, defendant had entered an order with plaintiff for the purchase of four Model B Oakland limousines for a total consideration of $6860. Certain deductions were made from the purchase price on account of an allowance for an Oakland roadster and certain discounts, leaving a net cash payment to be made of the sum of $5599.64. This document further provided that the purchaser should pay for the cars within ten days after notice

chaser should pay for the cars within ten days after notice sum of $2320.84. This document further provided that the purcertain discounts, leaving a net cash payment to be made of the price on account of an allowance for an Oakland roadster and creation of $2850. Certain deductions were made from the purchase purchase of four Model B Oakland limousines for a total consid- 11, 1917, defendant had entered an order with plaintiff for the

It appears from defendant's testimony that on December mentioned.

or not actual violence was used or threatened on the occasions undisputed except that there is some controversy as to whether Company from forcibly preventing its removal. This evidence is the protection of the bailiff, who kept the servants of the Flynn the bailiff who had the replevin writ and took the car away under and employes of defendant. Afterwards he went to the garage with the garage but was forcibly prevented from so doing by the agents collect. He attempted to get into the car and drive it from if he could not get the payment which he had been directed to be obliged to take the car back to plaintiff's place of business then inside the Flynn garage. Jackson told Flynn that he would ment for the car, which he declined to accept. The car was arrival Mr. Flynn offered him a check for about $1100 in pay- was accompanied by a mechanic who drove the car. Upon their shows that he delivered the car at the Flynn Auto Livery. He Jackson, through whom it had been bought. Jackson's testimony that he would have the car delivered by a salesman named without payment therefor. The assistant manager told Flynn it was contrary to the rules of his company to deliver a car to deliver the car, which the latter agreed to do, although replied that he was very busy and asked the assistant manager and bring with him $1300.01 in payment therefor. Mr. Flynn

that the cars were ready for delivery and that failure to do so should be a breach of the agreement; that in case of such breach the seller might retain as liquidated damages the cash deposited by it as part payment. It further provided that if instead of making a cash deposit the buyer should deliver to the seller a used car, in that event, in case of failure of the purchaser to pay within said ten days the car so delivered to the seller should be returned on payment by the purchaser of $200 as liquidated damages for a breach of the contract, together with expenses the buyer might have incurred in repairing, selling, advertising, storing and insuring the said used car. It appears from the document in question that a certain Oakland roadster was delivered by defendant to plaintiff in part payment on the purchase. This document was signed by the Flynn Auto Livery, but does not appear to have been signed and accepted by any officer of plaintiff. It will be noted that the cash payment of $1399.91 demanded by plaintiff for the automobile involved herein was one-fourth of this total cash payment specified in this document.

It seems to be the theory of defendant that this action is a suit based upon the above mentioned document or a breach of its terms and that the damages, if any, which plaintiff can recover must be limited to $200, the liquidated damages therein specified. This theory is untenable. The action is a replevin suit to try the right of possession of the automobile in question and to determine the damages, if any, sustained by plaintiff by reason of the detention of the automobile by defendant. This issue is wholly independent of the terms of the offer to purchase above mentioned. The finding of the trial court that plaintiff was entitled to the possession of the automobile in question is sustained by the preponderance of

the automobile in question is sustained by the preponderance of the evidence that plaintiff was entitled to the possession of the office to Furniture Space mentioned. The finding of the trial court that plaintiff was entitled to the possession of the automobile by reason of the retention of the automobile by defendant. This leave is wholly independent of the terms of the original contract between the parties, if any, sustained by plaintiff by reason of the right of possession of the automobile in question and to determine the damages, if any, sustained by reliance with respect to try the right of possession of the automobile therein specified. This theory is untenable. The notice in a writ of writ based upon the above mentioned document or a action is not based upon the above mentioned document or a theory of its terms and that the damages, if any, which plaintiff can recover must be limited to $50.00, the liquidated damages specified in the contract.

It seems to be the theory of defendant that this

this document.

hereto and one-fourth of this total cash payment specified in of $1500.00 demanded by plaintiff for the automobile involved affidavit of plaintiff. It will be noted that the cash payment but does not appear to have been signed nor accepted by any purchase. This document was signed by the Flynn Auto Piece. from the document in question that a certain Oakland roadster was delivered by defendant to plaintiff in part payment on the advertising, storing and insuring the said used car. It appears expenses the buyer might have incurred in repairing, selling, liquidated damages for a breach of the contract, together with should be returned on payment by the purchaser of $250 as to pay within said ten days the car so delivered to the seller used car. In this event, in case of failure of the purchaser naming a cash deposit the buyer should deliver to the seller a by it as part payment. It further provided that if instead of the seller might retain as liquidated damages the cash deposited should be a breach of the agreement; that in case of such breach that the cars were ready for delivery and that failure to do

the evidence, and therefore cannot be disturbed.

It is also contended that the damages awarded plaintiff are excessive and should be limited to the sum of $200, the amount of unliquidated damages specified in the agreement of December 11, 1917. As already stated, the provisions of the supposed contract of that date do not control in any way the decision of the issues involved in this case. The evidence indicates that during the time the car was in the possession of defendant it had been damaged and its value depreciated so that its value at the time it was taken under the replevin writ was between seven and eight hundred dollars. This evidence is practically undisputed. It is therefore apparent that the judgment of the trial court in assessing the damages at the sum of $650 was sustained by the evidence. We are not justified in disturbing the judgment of the trial court unless the same is clearly against the weight of the evidence. Ogilvie v. Copeland, 145 Ill. 98. It is well settled that compensation for any actual injury to property wrongfully taken is one of the elements of damage which may be assessed against the defendant by a successful plaintiff in a replevin suit. This includes not only compensation for any deterioration in the value of the goods replevied while they were in the hands of the defendant, but also for time lost and expenses incurred by plaintiff in recovering the same. Brennan v. Shinkle, 89 Ill., 604; McDonough v. Reilly, 131 Ill. App. 563.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

the evidence, and therefore cannot be disturbed.

It is also contended that the damages awarded plaintiff are excessive and should be limited to the sum of $500. The amount of unliquidated damages specified in the assignment of December 17, 1912. As already stated, the provisions of the supposed contract of that date do not control in any way the decision of the issues involved in this case. The evidence indicates that during the time the car was in the possession of defendant it had been damaged and its value depreciated so that its value at the time it was taken under the replevin writ was between seven and eight hundred dollars. This evidence is practically uncontradicted. It is therefore apparent that the judgment of the trial court in assessing the damages at the sum of $830 was sustained by the evidence. No one not justified in disturbing the judgment of the trial court unless the sum is clearly against the weight of the evidence. Gaffke v. Copeland, 148 Ill. 98. It is well settled that compensation for any actual injury to property standing taken in one of the elements of damage which may be assessed against the defendant in a replevin suit. This includes not only the value of the property at the time it was taken, but compensation for any deterioration in the value of the goods successfully plaintiff in replevin suit. Bloomer v. Whipple, 88 Ill. 504; McDonough v. Gaffke, 121 Ill. App. 622.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

54 - 26697

PAGE J. THIBODEAUX,
Appellee,

vs.

JOSEPH A. HAWSTAEDEL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

223 I.A. 647

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is appellee here, on November 20, 1920, brought an action of forcible detainer against appellant to recover possession of a one story frame building located upon the rear of the vacant lot immediately south of and adjoining a brick building located at 4856 Broadway, in the city of Chicago, used by defendant as a laundry. The case was tried before the court and a jury. At the close of all the testimony the court instructed the jury to return a verdict finding defendant guilty of unlawfully withholding the premises in question. This verdict was returned and judgment entered thereon, from which this appeal is prosecuted.

The evidence shows that defendant went into possession of the premises under an oral agreement with plaintiff which was the result of a conversation between them on February 17, 1919. The tenancy was terminated on November 17, 1920, by a thirty day notice, expiring on that date, given by the plaintiff for that purpose.

It is contended by appellant that the leasing was for an indefinite period and that defendant was entitled to retain possession of the premises and use the same as long as he desired to do so or until plaintiff desired to build upon the premises. This alleged agreement if made would have been in violation of the statute of frauds and apparently would have created a lease which might have been in perpetuity. Under the statute of frauds the

lease was not good for over one year and it was properly construed by the court to be a lease from month to month. The alleged agreement could not furnish the basis of a defense to the action. Wheeler v. Frankenthal, 78 Ill. 124; Mollitor v. C. M. Thom Van Company, 118 Ill. App., 293; Rader v. Huffman, 125 Ill. App. 554. The tenancy from month to month was terminated by the thirty day notice given to the landlord. Creighton v. Sanders, 89 Ill., 543.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

75 - 26727

HARRY BLOOD, a Minor, by RITA BLOOD, His Next Friend, Plaintiff in Error,

vs.

CONSUMERS COMPANY, a Corporation, Defendant in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

238 I.A. 647

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The declaration in this case contains three counts. In the first count it is alleged that the defendant carelessly, negligently and improperly operated its truck so that plaintiff was struck by it and suffered serious injuries as specified therein. The second count charges failure to sound a horn or give other warning of the truck's approach. The third count charges excessive speed in operating the truck along South Park avenue and through a closely built up residence section of Chicago. The accident occurred on December 8, 1913, at or near the intersection of South Park avenue and Twenty-fourth street in said city. Pleas of the general issue and non-ownership and operation were filed. There was a trial before the court and jury. At the close of the plaintiff's testimony the court instructed the jury to return a verdict finding defendant not guilty, which was done. Motion for a new trial was overruled and judgment entered on the verdict. A reversal of that judgment is sought upon the ground that the evidence on the part of plaintiff taken as true and considered most favorably for him, with all just inferences to be drawn therefrom, made out a prima facie case. The victim of the accident was a child two years and ten months of age and therefore it is admitted that plaintiff cannot be charged with contributory negligence and that the negligence, if any, of its parents cannot be attributed

RANNY BLOCK, a minor, by)
MIRA BLOCK, His Next Friend,)
Plaintiff in Error,)
)
vs.)
) ACTION TO RECOVER DOUBLE
CONSUMERS COMPANY, a Corporation,) OF COOK COUNTY.
Defendant in Error.)

74. TORTIOUS OPERATION DESTROYING USE OF LAUNDRY ON THE ROOMS.

The declaration in this case contains three counts.

In the first count it is alleged that the defendant negligently and improperly operated the truck so that plaintiff was struck by it and suffered serious injuries as described therein. The second count contains failure to warn a boy or boys of the truck's approach. The third count charges excessive speed in operating the truck along [illegible] and driving a closely built up residence portion of Chicago. The defendant entered on December 6, 1919, at or near the intersection of North Park avenue and Twenty-fourth street in said city. Upon of the general issue and non-assumpsit, and operation were filed. There was a trial before the court and jury. At the close of the [illegible] testimony the court instructed the jury to return a verdict finding defendant not guilty, which was done. Motion for a new trial was overruled and judgment entered on the verdict. A reversal of that judgment is sought upon the ground that the evidence was insufficient to support the verdict, and that the court erred in giving instructions for defendant. Plaintiff was [illegible] on the part of plaintiff stood at the corner of [illegible] made out a prima facie case. [illegible] for him, with all due deference to the [illegible] that plaintiff cannot be charged [illegible] cutting two [illegible] and [illegible] of [illegible] the negligence, if any, of the [illegible]

to the child. The testimony of the doctor as to plaintiff's injuries need not be considered at this time.

The evidence of other witnesses shows that the accident occurred at the time and place above stated. One witness testified in substance that he saw plaintiff standing near the northeast corner of the intersection of Twenty-fourth street and South Park avenue with a little girl; that a truck belonging to the defendant company came north on South Park avenue, passing the witness, traveling at least fourteen or fifteen miles an hour as it approached and crossed Twenty-fourth street; that the driver of the truck increased his speed at the street intersection several miles an hour in order to pass in front of a beer wagon which was going west on Twenty-fourth street and that in so doing the truck was driven diagonally across the street in a westerly direction and traveled on the wrong side of the street. He also testified that there was an altercation between the driver of the beer wagon and the driver of the truck and that there were no other vehicles on the street at the time. He continued to observe the truck, which, as it advanced and turned diagonally back toward the east side of the street, obscured his view of the boy, and that he next saw the driver of the truck picking up the boy near the right front wheel of the truck.

The child's mother, in addition to testifying as to plaintiff's age and injuries, stated that plaintiff was in front of the house between three and three thirty in the afternoon; that defendant's truck came along at a speed of fifteen or eighteen miles an hour and speeded up to twenty miles an hour. She also testified concerning the altercation between the driver of the beer wagon and the driver of the truck; that she went outside and found the Consumers Company truck No. 9 in the street loaded with coal. She

other

then went to the drugstore close by and found the driver of the truck present there with the injured boy.

The grandmother of the boy testified to seeing the truck standing in the street with a wet, dark red spot of about two inches in diameter on the right front wheel and that a little piece of white cloth with hair or hairs hanging on it was also present on the wheel.

The law governing the disposition of a motion to instruct the jury to return a verdict has been repeatedly declared by the reviewing courts of this state. The decisions upon the subject were reviewed in detail in the case of Libby, McNeil & Libby v. Cook, 222 Ill., 206, and it was there held in substance that if the record contains any evidence from which, if standing alone, the jury could, without acting unreasonably in the eye of the law, find that all the material allegations of the declaration have been proven, the case should go to the jury. The same rule was more recently applied in the case of Kelly v. Chicago City Rys. Co., 283 Ill. 642. We think that the evidence in this case, substantially as above set forth, fairly tended to prove the material averments of the declaration and that such evidence taken by itself was sufficient to sustain a verdict in favor of plaintiff, although it may be true that a verdict for plaintiff if returned could not be sustained, on a motion for a new trial, as against the manifest preponderance of all the evidence. Libby, McNeil & Libby v. Cook, supra. The question of the preponderance of the evidence does not arise in passing upon a motion for a peremptory instruction. It is also true that questions as to the weight of the evidence and the credibility of the witnesses cannot be considered in connection with such motion. Kelly v. Chicago City Rys. Co., supra. We are of the opinion that the testimony on behalf of plaintiff was sufficient, if taken by itself, to sustain a verdict for the plaintiff (Hodges v. Coey, 206 Ill. App. 417) and that the

then went to the drugstore clerk and found the driver of the truck present there with the injured boy.

The grandmother of the boy testified as pedestrian standing in the street with a wet, dark red spot of about two inches in diameter on the right front wheel and that a little piece of white cloth with hair or hairs on it was also present on the wheel.

The law governing the disposition of a motion to instruct the jury to return a verdict has been repeatedly declared by the reviewing courts of this state. The decisions upon the subject were reviewed in detail in the case of Lile v. McNeil & Libby v. Cook, 242 Ill., 290, and it was there held in every case if the record contains any evidence from which, if believed by the jury, the jury should, without acting unreasonably [illegible] the law, find all the material allegations of the declaration [illegible] the case should go to the jury. The [illegible] to direct a verdict [illegible] the evidence in favor of the party [illegible] do. [illegible], does not think that the evidence in favor of [illegible] was sufficient to sustain a verdict, fairly tending to prove the material allegations of the declaration and in favor of plaintiff, although [illegible] be true [illegible] for plaintiff it returned could not be sustained, or a motion for a new trial, we may not [illegible] of the evidence. In the case of Lile v. Cook, [illegible] of the proposition [illegible] a peremptory instruction. It is [illegible] a verdict [illegible] weight of the evidence and the credibility of witnesses [illegible] be considered in connection with each [illegible] Lile v. Cook and Libby [illegible] Co., supra. In one of the [illegible] for the plaintiff was entitled [illegible]

court erred in instructing the jury to return a verdict in favor of defendant.

The judgment of the Circuit court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

court erred in instructing the jury to return a verdict in favor of defendant.

The judgment of the Circuit court is reversed and the cause remanded.

Gridley, J., and Burton, J., concur.

87 - 26741

(20672)

ANNA KINTERA,
Plaintiff in Error,

vs.

JOSEPH OBORNY,
Defendant in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

223 I.A. 647

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The declaration in this case contains one count and charges that defendant committed an assault and battery upon plaintiff, beating her with a stick and pulling a quantity of hair from her head. A plea of the general issue was filed and a trial had before the court and jury, resulting in a verdict of not guilty. A motion for a new trial was overruled and judgment entered upon the verdict for costs against plaintiff. A reversal of this judgment is now sought upon the ground that errors occurred in giving certain instructions to the jury.

No bill of exceptions has been preserved. It has been repeatedly ruled by the Supreme Court of this state that in order to present for review the action of the trial court in giving, refusing or modifying instructions it is requisite that the instructions be set forth in a bill of exceptions and exceptions thereto noted in such bill. The instructions cannot be made a part of the record except by their incorporation in a bill of exceptions. Drew v. Beall, 62 Ill., 188; C. B & Q. R. R. Co. v. Haselwood, 194 Ill., 72; I. D. & W. Ry. Co. v. Hendrian, 190 Ill. 501; Arnold v. v. Dodson, 272 Ill., 384. These and numerous other authorities also hold that instructions are not made a part of the record for review in cases where no bill of exceptions has been preserved, but the clerk has inserted copies of the instructions in the transcript of record.

Defendant in Error.

vs.

Plaintiff in Error.

ANNA KIMMEY,

The record therefore does not present for review any of the alleged errors discussed in the brief of plaintiff in error.

The judgment of the Circuit court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

The record therefore does not present for review any of the alleged errors discussed in the brief of plaintiff in error.

The judgment of the Circuit court is affirmed.

AFFIRMED.

Ordley, J., and Barnes, J., concur.

99 - 26755

JULIUS DEBITS,
Appellee,

vs.

SOUTH SIDE BUICK SALES COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 647

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The statement of claim alleged an indebtedness on the part of defendant to plaintiff amounting to $1467.06 and set forth the specific items thereof. The largest of these items is a charge for four months rent of certain premises at $175 a month, amounting to $700. The other items are for electric light, coal, and telephone service used on the demised premises, commissions paid in connection with the business of defendant conducted on said premises and for the services of plaintiff in and about defendant's business. The affidavit of merits denies the existence of the indebtedness but does not question the reasonableness of the respective charges.

The evidence shows that the business relations between the parties originated under a written agreement between plaintiff and one Neuburger, who was a large stockholder and director in the defendant company and at one time its president. This agreement provided for the occupancy of the premises in question by the defendant company at the rental above specified with no obligation on the part of the lessor to furnish heat, light or telephone service. These premises prior to the agreement had been under lease to plaintiff. The agreement also provided that plaintiff should devote his entire time and attention to the service of defendant.

No. 20758

JUSTICE DEBATE.

Appellee.

vs.

SOUTH SIDE BRICK WORKS
COMPANY, - Corporation.
Appellant.

Appeal from Municipal Court
of Chicago.

No. JUSTICE COURT DECISION OF THE COURT.

The statement of claim alleged an item reserved on the part of defendant to Initial construction to $1400.00 and set forth the specific items thereof. The largest of these items is a charge for four months rent - of certain premises at $175 a month, amounting to $700. The other item was an electric light, and telephone service used on the 3d and 4th premises, commissions paid in connection with the business of defendant conducted on said premises and for the purpose of putting in and about defendant's business. The affidavit of merits denies the existence of the item reserved for above mentioned the amount of the claim

[illegible] the parties or [illegible] and one member, who was [illegible] defendant company at the usual [illegible] provided for the accountant [illegible] tendant [illegible] on the part of the [illegible] plaintiff. [illegible] vice. Those documents, [illegible] devote his entire time and attention to the work [illegible].

The terms and conditions of this agreement in so far as the same affected defendant were expressly accepted by all the stockholders and directors of the defendant company, as shown by a written endorsement upon the instrument signed by them. The relations thus established were the subject of sundry conversations between the parties which do not in any way tend to vary the terms of the written instrument so far as the indebtedness specified in the statement of claim is concerned.

There was a trial before the court without a jury, resulting in a finding and judgment in favor of plaintiff in the sum of $851.06. A reversal of this judgment is sought upon the ground that the judgment is contrary to the law and the evidence and that plaintiff was not entitled to recover for electric light, coal and telephone bills and for commissions paid to a third party. The aggregate amount of these items, to which specific objection is made, is $307.06. Plaintiff's claim was for $1467.06. The judgment was for $851.06. It is therefore apparent that the court allowed defendant credit for an amount considerably in excess of the items above mentioned, on which defendant has assigned error. No propositions of law or fact were submitted to the court and none held or refused.

Under these circumstances it is impossible for us to hold that the judgment is manifestly contrary to the weight of the evidence or contrary to the law.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

The terms and conditions of this agreement in so far as the same affected defendant were expressly accepted by all the stockholders and directors of the defendant company, as shown by a written endorsement upon the instrument signed by them. The relations thus established were the subject of numerous conversations between the parties which do not in any way tend to vary the terms of the written instrument so far as the indebtedness asserted in the statement of claim is concerned.

There was a trial before the court without a jury, resulting in a finding and judgment in favor of plaintiff in the sum of $881.06. A reversal of this judgment in amount upon the ground that the judge is contrary to the law and the evidence and that plaintiff was not entitled to recover for electric light, coal and telephone bills and for commissions paid to a third party. The aggregate amount of these items, to which objection is made, is $307.06. Plaintiff's claim was for $1187.06. The judgment was for $881.06. It is therefore evident that the court rejected defendant credit for an amount corresponding in excess of the items above mentioned, on which defendant has assigned error. No propositions of law or fact were submitted to the court and none held or refused.

Under these circumstances it is impossible for us to hold that the judgment is manifestly contrary to the weight of the evidence or contrary to the law.

The judgment of the District Court is affirmed.

Attorneys.

Tridley, F. J., and Barnes, J., counsel.

120 - 26777

JOSEPH CANTORE,
Appellee,

vs.

WARD BAKING COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

223 I.A. 6475

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal to reverse a judgment of the Municipal court of Chicago for $600 and costs in favor of appellee, who was plaintiff below, for damages to his property alleged to have been sustained by him on November 7, 1917. On that date an electric delivery truck, owned and operated by defendant, collided with the front part of plaintiff's store, located on Lake street in Melrose Park, Illinois. The statement of claim alleges negligence on the part of defendant in the management, operation and control of its truck. The affidavit of merits contains a general denial of the allegations of the statement of claim.

The evidence shows that Lake street is paved with brick and perfectly level. It is 62 feet wide, running east and west through Melrose Park. A public park is located on the north side of Lake street, extending the entire distance between Seventeenth and Eighteenth avenues. A public school building is located north of the park in the middle of a square block. About five hundred pupils were in attendance at this school building on the day of the accident. A grocery and delicatessen store, owned by one Anna Tomm, who was one of defendant's regular customers, is located on the southwest corner of Seventeenth avenue and Lake street, facing north on Lake street and east on Seventeenth avenue. The Municipal building is located across the street on the northwest corner. Plain-

Appellee,

vs.

Appellant.

No. 12811 A. C.P.C.

IN THE SUPREME COURT MAINTAINING THE OPINION OF THE COURT.

This is an appeal to reverse a judgment of the Municipal court of Ottawa for $500) and costs in favor of appellee, who was plaintiff below, for damages to his property alleged to have been sustained by him on November 7, 1917. On that date an electric delivery truck, owned and operated by defendant, collided with the front part of plaintiff's store, located on Lake street in Marine Park, Illinois. The statement of claim alleges negligence on the part of defendant in the management, operation and control of the truck. The affidavit of merits contains a general denial of the allegations of the statement of claim.

The evidence shows that Lake street is paved with brick and perfectly level. It is 66 feet wide, running east and west through Marine Park. A public park is located on the north side of Lake street, extending the entire distance between Seventeenth and Eighteenth avenues. A public school building is located north of the park in the middle of a square block. About five hundred pupils were in attendance at this school building on the day of the accident. A grocery and delicatessen store, owned by one Anna Toma, who was one of defendant's regular customers, is located on the southwest corner of Seventeenth avenue and Lake street, facing north on Lake street and east on Seventeenth avenue. The building is located across the street on the northwest corner. Plain-

tiff's store, known as 1710 Lake street, is located on the south side of that street about 200 feet east of Mrs. Tomm's store on the alley between Seventeenth and Eighteenth avenues.

Defendant operates a bakery establishment in Chicago and maintains electric trucks for the purpose of delivering merchandise to its trade in Chicago and vicinity. It also maintains a garage and repair department for its trucks. The electric truck in question was operated by means of a control lever located on the left side of the driver's seat. This lever had four notches, each of which indicated a different rate of speed. When the lever was in a vertical position it was in neutral. In addition to the lever it had a switch plug located on the right side of the driver's seat. This plug was in the shape of a pencil and could be removed from the switch slot. When this switch plug was inserted and pulled up in the slot, the effect would be to connect the battery with the motor. When the switch plug was pushed down the batteries would charge and when it was in a horizontal position it would be neutral. When this switch plug was removed from the slot the truck could not be started unless another plug was inserted in the slot. The truck could be started by inserting the switch plug and pulling it up and by pushing the control lever down. These two operations were required. If either the control lever or the switch plug was in neutral the truck would not run. The truck was also equipped with a steering wheel and a foot brake. The driver of the truck had worked for the defendant company about ten years and had been on this trade route about four years. On the morning of November 7, 1917, while its driver was in Mrs. Tomm's store, the truck ran east on Lake street for a distance of about 200 feet. At that time no one on behalf of defendant was in attendance upon the truck. After running this distance the truck turned southeast, running across the sidewalk and colliding with the front of plaintiff's building, break-

Defendant operates a parking establishment in Chicago and maintains electric trucks for the purpose of delivering merchandise to its trade in Chicago and vicinity. It also maintains a garage and repair department for its trucks. The electric truck in question was operated by means of a control lever located on the left side of the driver's seat. This lever had four notches, each of which indicated a different rate of speed. When the lever was in a vertical position it was in neutral. In addition to the lever, it had a switch plug located on the right side of the driver's seat. This plug was in the shape of a pencil and could be removed from the switch plug. When this switch plug was inserted and pulled up in the slot, the current would be in position to connect the battery with the motor. When the switch plug was pushed down the batteries would charge and when it was in a perpendicular position it would be neutral. When this switch plug was removed from the slot the truck could not be started unless another plug was inserted in the slot. The truck could be started by inserting the switch plug and pulling it up and by pushing the control lever down. These two operations were required. If all of the control levers or the switch plug was in neutral the truck would not run. The truck was also equipped with a steering wheel and a foot brake. The driving of the truck was done on Dearborn street about 300 feet east of Wells. Plaza's store, known as 1210 Wells street, is located on the south side of that street about 300 feet east of Wells. Plaza's store on the alley between Dearborn and Sigsbee streets.

1917, while the driver was in Plaza's store, the truck was left on Dearborn street for a distance of about 300 feet. At that time no one was in the truck except defendant who was in possession when the truck was operated by means of the control lever. After running a short distance the truck turned suddenly about to the south and ran into the defendant's automobile standing at the curb on the west side of Wells street, and collided with it, knocking it against the curb, and continued on its course, striking the front wheel of plaintiff's buggy, knocking the buggy over, and damaging the front wheel, fender, and body of the buggy to the amount of $75.00, and also damaging the truck to the amount of $25.00.

ing the glass windows and damaging the bulkheads and wall. When the driver reached the truck the motor was still running. The control lever was in the fourth or high speed and the switch plug was in an "on" position. The driver backed the truck out and used it all day. Nothing was found to have been damaged about the truck when inspected that night.

Plaintiff contends that defendant was guilty of negligence in the management of its truck; that the driver did not stop the truck in front of Mrs. Tomm's store but jumped off while it was in motion, leaving the switch plug in the slot and the batteries and motor connected, so that the truck continued on its way with no one in attendance, and caused the damage. Defendant contends that the truck was started by the act of a school boy named Rocco Guarrino, an independent third party; that the defendant had no control over him and is not liable for his act.

The driver testified that when he drove up to Mrs. Tomm's store he shut off his power by putting both switch and lever in neutral and stopped his truck. He then took some merchandise out of his truck and carried it into the store. While transacting his business with Mrs. Tomm he was informed by her that his truck was gone. He then ran out of the store and found the truck with the motor still running, the control lever in fourth speed and the switch plug up. Three different witnesses, who are in no way connected with the parties to the suit, testified in substance that they saw the driver get off the truck and that it was left standing in front of Mrs. Tomm's store for a definite length of time. They also saw the boy Rocco Guarrino jump on the truck and do something with its mechanism; thereupon the truck started. Rocco Guarrino then jumped off and ran down Eighteenth avenue. Mrs. Tomm is the only witness who testified in accordance with the theory of plaintiff. She says that she was in the back part of her store working

near the icebox when she saw the driver jump from the truck and come into her store to collect his money. She says that at that time the truck was still in motion. On cross examination her testimony shows that she was very uncertain as to the date when she remembered seeing the driver jump off the truck, and admitted that there was nothing fixing this particular morning in her mind over any other morning when the driver delivered merchandise in accordance with his regular custom.

It is urged by appellee that the doctrine of res ipsa loquitur applies and that the court correctly instructed the jury that if they believed from the evidence that the instrument or object causing the injury was under the control of the defendant and that the injury was one which would not in all probability have occurred if the person operating the truck had exercised due care in so doing, then the proof of the accident was prima facie proof of negligence and the burden of proof was on defendant to show by a preponderance of the evidence that it exercised due care in operating the truck. This contention is based upon the case of Feldman v. City of Chicago, 289 Ill., 25, which holds substantially in conformity with the instruction above mentioned. This instruction did not correctly state the law applicable to the case. It is well settled that the rule of res ipsa loquitur cannot be applied where there is no direct evidence of negligence on the part of defendant, and it is apparent that other causes may have led to the accident. The great weight of evidence in this case is to the effect that defendant was guilty of no negligence. The truck was standing on perfectly level ground. It could not have started of its own volition. It must have been set in motion by the intervening act of some third party. The injury resulted from the act of the third party. The condition which was created by defendant

of the third party. The question after was directed to defendant
counsel not of mere third party. The injury was done when it was
at the own volition. It must have been set in motion by the injur-
ing was standing on negligent level ground. It cannot be argued
the effect that defendant was guilty of no wilful act. The injury
the accident. The first point of evidence in this case was for the
defendant, and it is obvious that some concern may have for the
agree there is no absent evidence of negligence on the part of
well settled that the rule of res ipsa loquitur cannot be applied
in conformity with the instruction given most favorable. This instruc-
tion did not correctly state the law applicable to the case. It is
Robinson v. City of Spokane, 269 Ill., 21. [illegible] sufficiently
to submit the case to the jury. This conclusion is based upon the case of
shown by a preponderance of the evidence that it occasioned the same
proof of negligence and the burden of proof was on plaintiff to
care is so great, then the proof of the accident was res ipsa loquitur
here occurred if the person operating the truck had exercised due
and that the injury was one which would not in all probability
effect ensuing the injury was under the control of the defendant
that if they believed from the evidence that the instructed or
It is urged by appellee that the question of res ipsa loquitur
arose in the case, and the court correctly instructed the jury
with his regular custom.

and other morning when the driver delivered merchandise in accordance
there was nothing fixing this particular morning in her mind over
membered seeing the driver jump off the truck, and admitted that
stand why plaintiff was not able to see the driver just from the truck and
come into her store to collect his money. She says that at that
time the truck was still in motion. On cross examination her tes-
timony shows that she was very uncertain as to the date when she re-

was not the proximate cause of the injury. No negligence can be charged against the owner of the truck from the fact that he failed to take precautions against the interference of a third party. In such a case the rule of res ipsa loquitur does not apply. This rule cannot be applied where no negligence on the part of the defendant is shown by direct evidence, and where it is apparent that there were other causes than the defendant's negligence which led to the accident. Keber v. Central Brewing Co., 150 N. Y. Supp. 986; Keenan v. M. & C. Elevator Co., 113 ibid 343; Fraschella v. Taylor, 157 ibid 881. The last case cited involved circumstances very similar to those which existed in the present case.

We are also of the opinion that the judgment of the Municipal court is contrary to the manifest weight of the evidence. The judgment is based upon the vague and uncertain testimony of one witness, who is uncorroborated. Her testimony is directly contradicted by three independent eye witnesses and also by the positive testimony of the driver. The plaintiff has proved no cause of action against defendant. Under such circumstances it is the duty of this court to reverse the judgment. Davenport v. C. & S. C. Ry. Co., 197 Ill. App. 372; Berg v. C. R. I. & P. R. R. Co., 162 Ill. 348.

The judgment of the Municipal court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, P.J., and Barnes, J., concur.

120 - 26777 FINDING OF FACTS.

We find as ultimate facts in this case that defendant was not guilty of the negligence charged in plaintiff's statement of claim, and that the injury to plaintiff's property was not caused by the act of defendant.

We find no ultimate facts in this case that defendant caused by the act of defendant.

RL claim, and that the injury to plaintiff's property are not are not exactly of the modifications changed in plaintiff's statement

132 - 26790

MORSE BROS. MACHINERY & SUPPLY COMPANY,
Appellee,

vs.

R. ROSENBERG, doing business as Rosenberg Iron & Steel Co.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 648

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case, filed May 20, 1920, alleges that plaintiff's claim is for the sum of $5,000, evidenced by a check dated February 2, 1920, drawn on Foreman Bros. Banking Company of Chicago by defendant and payable to plaintiff, and protest fees thereon amounting to $2.58, together with interest at five per cent per annum from the date of the check. The affidavit of merits alleges that the check in question was given in payment for a quantity of yard rails which plaintiff agreed to deliver to defendant within twenty days from February 7, 1920; that plaintiff has failed, refused and neglected to deliver said rails at any time and that defendant has received no consideration for said check other than the undertaking above mentioned. There was a trial before the court without a jury resulting in a finding and judgment in favor of plaintiff for $5177.10, a reversal of which is now sought.

The evidence shows that on February 7, 1920, the parties entered into a written agreement, which among other things provided that plaintiff represents itself to be the owner of a large quantity of iron rails and bars which it

BOWEN BROS. MACHINERY
& SUPPLY COMPANY,

Appellee,

vs.

R. ROSENBERG, doing
business as Isenberg
Iron & Steel Co.,

Appellant.

APPEAL FROM
CONSTABLE COURT
OF WHITSON.

MR. JUSTICE MOSLEY DELIVERED THE OPINION OF THE COURT.

The defendant at claim in this case, filed May 20, 1920, alleges that plaintiff's claim is for the sum of $6,000, evidenced by a check dated February 2, 1920, drawn on Peterson Bros. Banking Company of Chicago by defendant and payable to plaintiff, and protest fees thereon amounting to $1.00, together with interest at five per cent per annum from the date of the check. The affidavit of merits alleges that the check in question was given in payment for a machinery [illegible] of the check. [illegible] that plaintiff agreed to deliver to defendant within twenty days from February 7, 1920; that plaintiff delivered, the same turned and ready for [illegible] and that defendant has refused to accept [illegible] the said machine upon the ground that it was not as represented. Upon the trial before the court without a jury [illegible] in a finding and judgment in favor of plaintiff for $[illegible], the amount of said check, interest and protest fees. Defendant in due time moved for a new trial, which motion was overruled, to which ruling defendant excepted and brings the cause to this court by appeal.

The evidence shows that on February 7, 1920, the parties entered into a written agreement, whereby Bowen Bros. [illegible] owner of a large quantity of [illegible] on a [illegible] which it [illegible] bridge purposes [illegible]. [illegible] to be the property entered into a written agreement, whereby Bowen Bros. [illegible] owner of a large quantity of [illegible] on a [illegible] which it [illegible] bridge purposes [illegible]. [illegible] to be the

agreed to sell to defendant at $45 per gross ton f. o. b. Boulder, Colorado, and further recited that plaintiff had five hundred tons of such rails ready for shipment, which would commence within twenty days from the execution of the agreement, and that plaintiff would continue to ship to defendant from time to time, so that all rails should be shipped prior to July 1, 1920. The terms of payment were that the buyer, contemporaneously with the execution of agreement, pays the seller the sum of $5,000 in cash, the receipt of which was acknowledged. Said $5,000 was to be applied and credited upon the first shipment of rails until exhausted as such credit, and that thereafter the buyer should pay for each shipment on presentation of a bill of lading. The president of the plaintiff corporation testified that he received the check in question at the time of the execution of the agreement and that no rails or merchandise of any kind was ever shipped by plaintiff to defendant.

Under section 28 of the Negotiable Instruments Act, absence or failure of consideration is a matter of defense against any person other than a holder in due course. The validity of such defense has been repeatedly recognized by the reviewing courts of this state. Corwith v. Colter, 82 Ill. 585; Martin v. Martin, 202 Ill., 386; Farris v. Alfred, 171 Ill. App., 172. We are of the opinion that the evidence in this case fully establishes the fact that defendant received no consideration for the check in question and that therefore plaintiff cannot recover in a suit upon said check.

It is urged by appellee that the contract between the parties contained a further provision whereby it was agreed between the parties that defendant was to secure a "bank guarantee" for the payment of each and every shipment of rails

agreed to notify so defendant at 345 Sherman Ave. C. S.
Boulder, Colorado, and further recited that plaintiff had fix
guaranteed term of one year's rent for apartment, which rental
commenced eighth month's rent from the execution of the agree-
ment, and that plaintiff would continue to pay to defendant
from time to time, so that it will rents should be applied prior
to July 1, 1940. The terms of payment were that the payer,
conscientiously with the execution of agreement, make the
earlier the sum of $15.00 in cash, the receipt of which was
acknowledged. Said $15.00 was to be applied and credited upon
the first eight months of rents already expended as such cash
thereunder; the payer should pay for each subsequent an
preconstruction of a ... ily of Denver. The plaintiff of the plain-
tiff acquisition instituted that be received the check in question
at the time of the execution of the agreement and it is rely
on accommodation of the first month's rent by plaintiff to
defendant.

Under section 19 of the Negotiable Instrument Act,
absence or failure of ... id section is ... presentment
against any person otherwise ... liable in due course. The
validity of such delivery may then reasonably ... by the
certain course of this case. Compton . Bird, ... 134.
188; Martin v. Martin, ... 141.; Cooley v. ... 1st. 1st.
111. Dow., 12. ... of law ... ly ... cheque in
this case first ... plaintiff received no
consideration for ... and ... plaintiff
plainly ... in ... .
It is urged by ... that ... .
between the parties ... and ... Check
... .

upon presentation of the bill of lading and weight certificate and that in the event of the failure of the buyer to secure such guarantee the seller might retain and keep the $5,000 paid by defendant to plaintiff upon the execution of the contract, as liquidated damages. It should be noted that the alleged guarantee of payment was not to be furnished until presentation of a railroad bill of lading and weight certificate. As no shipment was ever made, it is obvious that no bill of lading and weight certificate were ever presented to defendant, and consequently defendant was under no obligation to furnish the guarantee in question. The position is untenable for the further reason that this action is upon the check in question and not for the recovery of damages for the breach of the contract between the parties.

The judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

132 - 26790

FINDING OF FACT.

We find as an ultimate fact in this case that defendant received no consideration for the check set forth in plaintiff's statement of claim.

125 - 3250

"INDEX OF PAGES".

We find as an evidence from this case that defendant received no consideration for the check set forth in plaintiff's statement of claim.

150 - 26809

WILLIAM J. EDWARDS,
Appellee,

vs.

MARY BOUGHAN, WILLIAM J. BRENNAN and WILLIAM McCARTHY,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

223 I.A. 648

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This appeal seeks the reversal of a judgment of the Circuit court of Cook county for $500 against appellants, who were defendants in the court below. The case was tried before the court and a jury. Appellants contend that the judgment is contrary to the law and the evidence and that the court erred in sundry rulings upon questions of evidence and in giving and refusing instructions. It will not be necessary for us to discuss these rulings, as we are satisfied that plaintiff is not entitled to recover under the evidence and the law applicable thereto.

The declaration contains four counts, in two of which defendants are charged with malicious prosecution of the plaintiff and in the other two counts false arrest and false imprisonment are charged. The evidence unquestionably discloses that sundry chickens were stolen from the defendant Mary Boughan. Her son saw one of these chickens, which was distinguished by the name of "Army," upon the premises occupied by plaintiff. Upon this information being communicated to Mary Boughan, she went to the Edwards' domicile, which was in the sole custody and control of plaintiff, and found there her pet chicken, denominated as aforesaid. Upon the arrival of Mrs. Boughan at the house, Edwards, the plaintiff, immediately locked up the basement before entering into conversation with her. After some inconsequential talk with Edwards, Mrs. Boughan left the premises, and in response to her telephone communication Sergeants Brennan and

150 - 26609

WILLIAM J. EDWARDS,
Appellee,

vs.

MARY BOUGHAN, WILLIAM J. BRENNAN
and WILLIAM McCARTHY,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

291 I.A. 659

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This appeal seeks the reversal of a judgment of the Circuit court of Cook county for $500 against appellants, who were defendants in the court below. The case was tried before the court and a jury. Appellants contend that the judgment is contrary to the law and the evidence and that the court erred in sundry rulings upon questions of evidence and in giving and refusing instructions. It will not be necessary for us to discuss these rulings, as we are satisfied that plaintiff is not entitled to recover under the evidence and the law applicable thereto.

The declaration contains four counts, in two of which defendants are charged with malicious prosecution of the plaintiff and in the other two counts false arrest and false imprisonment are charged. The evidence shows practically without dispute that many chickens were stolen from the defendant [illegible] of those chickens, which was distinguished by the name of [illegible] upon the premises occupied by plaintiff. Upon this information [illegible] communicated to Mary Boughan, [illegible] which was in the sole custody and control of plaintiff, [illegible] her pet chicken, [illegible] Boughan at the house. [illegible] the basement before [illegible]. Their more inconsequential talk with [illegible] and in response to her [illegible]

McCarthy, who are also defendants in the court below, went with her to the Edwards' house. Edwards told them that the chickens upon the premises belonged to his mother and that he was in charge of the premises for the purpose of selling eggs and chickens. Subsequently Mrs. Boughan's chickens were found in the basement of the house by her and the officers. Edwards was thereupon placed under arrest and charged with petit larceny. Upon the trial of the case Edwards was discharged. He thereupon brought this action.

In a recent decision the Supreme court of this State has reviewed the law upon the subject of actions for malicious prosecution and has stated the facts which are necessary to sustain such an action, among which necessary elements are the absence of probable cause for the proceeding upon which the action is based, and the presence of malice in the action. The absence of any of these elements is sufficient to defeat a recovery. Glenn v. Lawrence, 280 Ill., 587. The court said in substance that if malice and want of probable cause do not concur the action cannot be maintained. The burden is upon the plaintiff to show that there was no probable cause or reasonable ground for the prosecution, citing Israel v. Brooks, 23 Ill. 526. Probable cause has been defined in Harpham v. Whitney, 77 Ill. 32, as such a state of facts as would lead a person of ordinary cautiousness and prudence to believe and to entertain an honest and strong suspicion that the person is guilty. See also Ross v. Innis, 35 Ill. 487; McDavid v. Blevins, 85 Ill. 238. The belief that the accused is guilty must be held in good faith and based upon circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person that the defendant in the prosecution was guilty of the particular offense charged.

In the case at bar it is undisputed that the chickens

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the defendant in the prosecution was guilty of the particular of-
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and the presence of malice in the action. The absence of any of
these elements is sufficient to defeat a recovery. Ilgen v. Lam-
berg, 280 Ill. 387. The court said in doing so that if malice
and want of probable cause do not concur the action cannot be main-
tained. The burden is on the plaintiff to show that there was
no probable cause or reasonable ground for the prosecution, citing
Larmel v. Brooks, 23 Ill. 293. Probable cause has been defined in
Harlgus v. Whitney, 77 Ill. 59, as such a state of facts as would
lead a person of ordinary curiousness and prudence to believe and
to entertain an honest and strong conviction that the person is
guilty. See also Rose v. Ingle, 46 Ill. 467; Schavin v. Sterling,
83 Ill. 339. The belief that the accused is guilty must be held in
good faith and based upon circumstances sufficiently strong to in-
duce the belief in the mind of a reasonably cautious person that

were stolen and that they were found upon premises in the sole custody and control of the person accused of the theft. He at first denied the presence of the chickens which were afterwards found in the basement of the premises, which he had locked up. He made no objections to their removal. We are of the opinion that the circumstances were sufficiently strong to induce the belief in the mind of a reasonably cautious person that plaintiff was guilty of the offense charged.

But it is urged by appellee that there should be a recovery upon the counts charging false arrest and false imprisonment for the reason that it is unnecessary to prove malice or want of probable cause in an action based upon those counts. This question has also been considered by the Supreme court in the case of Enright v. Gibson, 219 Ill., 550, which is cited by appellee, from which it appears that under section 4, division 6, of the Criminal Code of this State, "an arrest may be made by an officer or a private person without warrant for a criminal offense committed or attempted in his presence and by an officer when a criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it." In discussing this statutory provision the court indicates that both a citizen and an officer may arrest when an offense is committed or attempted to be committed in his presence, but an officer may also arrest where a criminal offense has in fact been committed and he has reasonable grounds for believing that the person arrested has committed it. A citizen does not have the power of making an arrest under the latter circumstances. He must not be permitted to take the law into his own hands and to make an arrest upon probable cause of guilt. The arrest in the case at bar was made by the two officers who are defendants herein, and as has already been indicated, they had probable cause for believing that the person arrested had com-

were stolen and that they were found upon persons in the sole custody and control of the person accused of the theft. He at first denied the presence of the chickens which were afterwards found in the basement of the premises, which he had locked up. He made no objections to their removal. In are of the opinion that the circumstances were sufficiently strong to induce the belief in the mind of a reasonably cautious person that plaintiff was guilty of the offense charged.

But it is urged plaintiffs that there should be a recovery upon the counts charging false arrest and false imprisonment for the reason that it is unnecessary to p ove malice or want of probable cause in an action based upon those counts. This proposition has also been considered by the Supreme court in the case of Wright v. Gibson, 210 Ill., 85, which is cited by plaintiffs from which it appears that under section 6, division 6, of the Criminal Code of this State, "an arrest may be made by an officer or a private person without warrant for a criminal offense committed or attempted in his presence and by an officer upon a criminal charge that in fact has been committed and a reasonable ground for believing that the person arrested committed it." Unreasonable or unlawful acts on the part of the officer making an arrest under a criminal charge in fact been committed will not be considered in this instance, but an officer may only arrest where a person has committed or attempted to commit a crime in his presence, or an officer may arrest upon a criminal charge that in fact has been committed and a reasonable ground for believing that the person arrested committed it. A citizen does not have the power of making an arrest under the ground for believing that the person arrested committed it.

mitted the offense charged. Under these circumstances protection must be given to the citizen who makes the complaint and to the officers who make the arrest. This has been the rule followed by the courts of this State from an early date. Dodds v. Board, 43 Ill. 95.

The original certificate of evidence filed herein contained no record of a motion for a new trial and its denial by the court. A document has been filed which is denominated a supplemental bill of exceptions but which is in reality an amendment to the original bill of exceptions. This document shows that a motion for a new trial was made and overruled by the court. A motion has been made to strike this document from the files. This motion is denied. Anderson v. Karstens, 297 Ill. 80.

The judgment of the Circuit court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

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tion must be given to the officer who makes the complaint and
to the officer who made the arrest. This has been the rule
followed by the course of this Court for many early days.
Dodds v. Howard, 43 Ill. 93.

The original certificate of evidence filed herein contained no record of a motion for a new trial and the denial by the court. A document has been filed which is described as supplemental bill of exceptions but which is in reality an amendment to the original bill of exceptions. This document shows that a motion for a new trial was made and overruled by the court. A motion has been made to strike this document from the files. This motion is denied. Anderson v. Carlson, 237 Ill. 87.

The judgment of the circuit court is reversed with a finding of fact.

Bradley, P. J., and Barnes, J., concur.

150 - 26809

FINDING OF FACT.

We find as an ultimate fact in this case that there was probable cause for believing that the plaintiff was guilty of the offense charged against him.

ISO - 28909

FINDING OF FACT.

We find as an ultimate fact in this case that there was probable cause for believing that the plaintiff was guilty of the offense charged against him.

155 - 26814

GEORGE F. PORTER,
Appellee,

vs.

LANDON CABELL ROSE et al.,
On appeal of LANDON CABELL ROSE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

22 I.A. 648

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This suit is based upon the provisions of a ninety-nine year lease, dated November 24, 1911, demising the premises known as 178-182 West Washington street in the City of Chicago. The appellee was the lessor in said lease and plaintiff in the Municipal Court and the appellant was lessee therein and one of the defendants in the court below. There were numerous assignments of the lease subsequent to its execution, so that at the time the suit was instituted the interest of the original lessee was owned by appellant and his co-defendant, Daniel J. Schuyler, Jr. Under these assignments, defendants became jointly and severally liable for the performance of all the covenants of the original lease. The case was tried before the court without a jury and resulted in a finding and judgment in favor of plaintiff in the sum of $5,070.73, a reversal of which is now sought. The appeal was prayed by both defendants but has been perfected by the defendant Rose alone.

The statement of claim alleges the execution of the original lease and covenants therein contained relating to the payment of taxes and assessments upon the demised property, the various assignments of the lessee's interest as above stated, and that plaintiff's claim is for the amount paid by him in the

No. 10 - 20814

ESTHER Z. POLTER,

Appellee,

vs.

LAWSON CHANIT NODE et al.,

Appellant.

On appeal of LAWSON CHANIT NODE,

MUNICIPAL COURT

OF CHICAGO.

APPEAL FROM

MR. JUSTICE MONNITT DELIVERED THE OPINION OF THE COURT.

This suit is based upon the provisions of a ninety-nine year lease, dated November 24, 1911, demising the premises known as 178-182 West Washington street in the City of Chicago. The appellee was the lessor in said lease and plaintiff in the Municipal Court and the appellant was lessee therein and one of the defendants in the court below. There were numerous assignments of fact to be considered on its execution, but at the time the suit was instituted the interest of the original lessee was owned by appellant and his co-defendant, Daniel J. Comyler, Jr. Under these assignments, defendants became jointly and severally liable for the performance of all the covenants of the original lease. The case was tried before the court without a jury and resulted in a finding and judgment in favor of plaintiff in the sum of $5,070.94, a reversal of which is now sought. The appeal was prayed by both defendants but has been perfected by the defendant Node alone.

The statement of claim alleges the execution of the original lease and covenants therein contained relative to the payment of taxes and assessments upon the demised property, the various assignments of the lessee's interest as above set forth and that plaintiff's claim is for the amount paid by him in the

purchase of a certificate of sale of the said premises for non-payment of the general taxes for the year 1918 and interest thereon; also for the purchase of three certificates of sale of said premises for non-payment of different special assessments upon said premises with interest thereon and certain sums paid by plaintiff for commissions in connection with the purchase of said certificates, and the further sum of $700 for attorneys' fees in the prosecution of this suit.

The amended affidavit of merits filed by appellant sets forth the execution of the lease of November 24, 1911, and sundry provisions thereof relating to the assignment of the lessee's interest therein. It also alleges a release and discharge from the payment of the various claims upon which this suit is based because of the provisions embodied in an agreement dated November 19, 1917, between plaintiff and defendants. A proposition of law based upon this ground of defense was refused by the trial court. No argument is presented to this court based upon that refusal. We therefore conclude that this ground of defense has been abandoned and waived by appellant.

The affidavit of merits also sets forth certain provisions of the lease of November 24, 1917, which will be discussed later, regarding the payment of taxes and special assessments upon the demised premises, and the failure of plaintiff to give to appellant a thirty day notice in writing of the payment of the various sums for which plaintiff claims reimbursement. The affidavit denies that plaintiff is entitled to recover the items charged for commissions and interest upon its various disbursements. It also denies liability for attorneys' fees. The making of the payments set forth in plaintiff's statement of claim is not disputed, but it is alleged by way of defense that the action was prematurely

purchase of a certificate of sale of the said premises for non-payment of the general taxes for the year 1918 and interest thereon; also for the purchase of three certificates of sale of said premises for non-payment of different special assessments upon said premises with interest thereon and certain sums paid by plaintiff for commissions in connection with the purchase of said certificates, and the further sum of $700 for attorneys' fees in the prosecution of this suit.

The amended affidavit of merits filed by appellants sets forth the execution of the lease of November 24, 1911, and sundry provisions thereof relating to the assignment of the lessee's interest therein. It also alleges a release and discharge from the payment of the various claims upon which this suit is based because of the provisions contained in an agreement dated November 12, 1917, between plaintiff and defendants. A proposition of law based upon this ground of defense was refused by the trial court. No argument is presented in this court based upon that refusal. We therefore conclude that this ground of defense has been abandoned and waived by appellants.

The affidavit of merits also sets forth certain provisions of the lease of November 24, 1911, which will be discussed later, regarding the payment of taxes and special assessments upon the demised premises, and the failure of plaintiff to give to appellants a thirty day notice in writing of the payment of the various sums for which plaintiff claims reimbursement. The affidavit denies that plaintiff is entitled to recover the items charged for commissions and interest upon its various disbursements. It also denies liability for attorneys' fees. The making of the payments set forth in plaintiff's statement of claim is not disputed, but it is alleged by way of defense that the action was prematurely

brought on account of the failure of plaintiff to give the thirty day notice above mentioned and that defendants are not in any event liable for the various items of commissions and interest in connection with the purchase of the certificates of sale or plaintiff's expenses for attorneys' fees incurred in this action. Upon the trial of the case it was stipulated that in the event of a judgment for the plaintiff, the sum of $400 might be included on account of such attorneys' fees, which was done. The judgment included the various items specified in plaintiff's statement of claim amounting to $4,670.73 and $400 on account of attorneys' fees, making the total amount of the judgment $5,080.73. There being no dispute as to the amount of these disbursements by plaintiff, it follows that the rights of the parties must be determined by a consideration of the terms of the original lease and the evidence as to compliance with these terms by the respective parties.

The principal question presented for determination herein is, whether, in view of the provisions of the lease, plaintiff could maintain this suit without giving the thirty day notice already mentioned, it being contended by appellant that the giving of this notice was a condition precedent with which plaintiff was bound to comply before instituting suit. Under the terms of the original lease the lessees agreed to pay all taxes and assessments within thirty days after they respectively became due and payable and to make such payment in apt time to prevent the accrual of any penalty thereon or any sale or forfeiture thereon or any part thereof. The language of this covenant is plain and the obligation imposed upon the lessee by its terms is absolute and independent of any of the other provisions of the lease. We are of the opinion that under its provisions plaintiff had the right to maintain an action against the lessee for the amount of such

brought on account of the failure of plaintiff to give the thirty day notice above mentioned and that defendants are not in any event liable for the various items of commissions and interest in connection with the purchase of the certificates or suits or plaintiff's expenses for attorneys' fees incurred in this action. Upon the trial of the cause it was stipulated that in the event of a judgment for the plaintiff, the sum of $400 might be included on account of such attorneys' fees, which was done. The judgment included the various items specified in plaintiff's statement of claim amounting to $4,027.73 and $400 on account of attorneys' fees, making the total amount of the judgment $4,080.73. There being no dispute as to the amount of these disbursements by plaintiff, it follows that the rights of the parties must be determined by a consideration of the terms of the original lease and the evidence as to compliance with these terms by the respective parties.

The principal question presented for determination herein is, whether, in view of the provisions of the lease, plaintiff could maintain this suit without giving the thirty day notice already mentioned. It being contended by appellant that the giving of this notice was a condition precedent with which plaintiff was bound to comply before instituting suit. Under the terms of the original lease the lessee agreed to pay all taxes and assessments within thirty days after they respectively become due and payable and to make such payment in ample time to prevent the accrual of any penalty thereon or any sale or forfeiture thereon or any part thereof. The language of this covenant is plain and the obligation imposed upon the lessee by its terms is one just and independent of any of the other provisions of the lease. It was of the opinion that under its provisions plaintiff had the right to maintain an action against the lessee for the amount of such

taxes and assessments paid by him. In addition to this provision of paragraph 3 of the original lease, which has just been considered, the lease further provided in substance that if the lessee should fail to pay any such taxes or assessments, the lessor might at his option, although not obligated so to do, advance and pay any and all moneys reasonably necessary to make good any such default of the lessee, and if the lessor should make any such payment, the lessee covenanted to repay the lessor the amount thereof within thirty days after notice by the lessor of such payment with interest thereon at the rate of seven per cent per annum from the time when said payments were made respectively.

It was further provided in said lease that if lessor should advance any moneys for the payment of such taxes or assessments or for the redemption of the demised premises from any tax sale or for the purchase or cancellation of any tax title thereafter derived under such sale, it should not be obligatory upon the lessor before making any such advance or payment to make any inquiry whatever into the validity of any such taxes or assessments or any such tax title, and further that in purchasing and cancelling any tax title upon the premises the lessor should not be limited to the amount to which the holder of such tax title would be entitled upon the setting aside of the same by decree of court, but the lessor should have the right to make such terms with the holder of such tax title as the lessor might deem proper, even though the amount paid therefor be in excess of the amount which the holder of such tax title would be entitled to receive and that the entire sum so paid by the lessor shall then be due and payable to the lessor from the lessee.

The evidence shows that the non-payment by defendants of the taxes and special assessments set forth in plaintiff's statement of claim was brought to the attention of defendants

statement of claim may be right to the extention of defendants of the taxes and special assessments set forth in plaintiff's and payable to the lessor from the lessee.

The evidence shows that the non-payment by defendants and it is the duties now so paid by the lessor which can be due which the holder of such tax title to the lessor might demand even though the amount paid thereafter be in excess of the amount the amount of such tax title would be entitled to receive of the holder of such tax title. but the lessor should have the right to make such terms would be entitled upon the resulting parity of the sale by decree of not be limited to the amount to which the holder of such tax title and unconditional tax title upon the premises the lessor should necessarily or any such tax title, and further that in purchasing any inquiry whatever into the validity of any such title or upon the lessor before making any such advance or payment to make thereafter derived under such sale. it should not be obligatory only tax sale or for the purchase or cancellation of any tax title assessments or for the redemption of the defendant premises from should advance any moneys for the payment of such taxes or

It was further provided in said lease that if lessor cannot from the time when said payments were to respectively. payment with interest thereon at the rate of seven per cent per thereof within thirty days after notice by the lessor of such payment, the lessee covenanted to repay the lessor the amount default of the lessee, and if the lessor should make any such may and all moneys reasonably necessary to make good any such at his option, although not obligated so to do, advance and pay should fail to pay any such taxes or assessments, the lessor might of paragraph 5 of the original lease, which has just been considered, the lease further provided in substance that if the lessee taxes and assessments paid by him. In addition to this provision

more than thirty days prior to the institution of this suit. The failure of defendants to pay these taxes and special assessments in conformity with the obligation imposed upon them by the lease was the subject of numerous interviews between the attorneys and agents of the parties hereto, and in one of these interviews it was apparent that defendants expected plaintiff to bring action for the non-payment of these taxes and assessments and inferentially invited plaintiff so to do. In view of this evidence, we are of the opinion that the trial court was justified in holding that plaintiff was not precluded from bringing this action on account of any failure on his part to give the thirty day notice mentioned in the original lease.

But it is urged on behalf of appellant that the notice which the lessors were required to give should have been in writing, setting forth in detail the items of plaintiff's claim, and further, that such written notice should have been deposited in the mail in strict conformity with the provisions of paragraph 13 of the lease. This paragraph provided that each of the parties should designate some person or corporation in the City of Chicago as his agent to receive notices and demands and should furnish his own address and the address of such agent, which might be changed from time to time, and further provided that if any notice contemplated by the provisions of the lease should be addressed to the party to be notified at the address so furnished or to the agent so designated, and sent by registered mail to such party or agent at such address, such delivery or sending should be deemed for the purposes of the lease, a good and sufficient service of such notice upon the party so sought to be notified. As we view this provision of the lease, it set forth a method by which either of the parties to the lease might give notice to the other and that by complying with these conditions the party so notified would be prevented from disputing the

the party no motion would be necessary thus eliminating the motion to the other and that by complying with these conditions a method by which either of the parties to the suit might stay modified. As the other side practically the suit, it was not entitled to demand for the purpose of the motion, a good and sufficient warrant of such motion upon the party to comply so to such party or agent of such party, which might be or to the agent no dealings', was sent by registered mail to addressed to the party to be notified of the motions to further notice contemplated by the provisions of the Rules should be changed from time to time, and therefore that it was his own request and two notices of such amount, which might be or his agent to receive notices and demands and should further should provide designate some person or corporation in the city of Ohio 13 of the Rules. This Subsection that each of the parties in the suit in which corporation with the provisions of Section Number, that such written notice should have been deposited receipt form in behalf the items of plaintiff's claim, and day notice mentioned in the original Rules.

But it is urged on behalf of appellant that the notice motion on account of any failure on his part to give the thirty in posting that plaintiff was not prevented from bringing this evidence, we are of the opinion that the trial court was justified and intelligently invited plaintiff so to do. In view of this to posting notice for the non-payment of these taxes and assessments interpleaded it was apparent that defendants opposed plaintiff attorneys and agents of the parties hereto, and in one of these by the Rules was the subject of numerous interviews between the assessments in connection with the utilities imposed upon them The failure of defendants to pay these taxes and special more than thirty days prior to the institution of this suit.

sufficiency of the notice. It defined a method of serving a notice or demand which, under all circumstances, would be deemed sufficient and valid. This provision does not preclude either of the parties from giving a different kind of a notice and serving the same in a different manner. It does not require that all notices must be given in the manner specified. Consequently we consider the position of appellant untenable, in urging that plaintiff was precluded from maintaining his action by his failure to give a written notice in the manner specified in paragraph 13 of the original lease, it being apparent that defendants had ample notice and were well aware of their default in respect to the payment of taxes and assessments more than thirty days prior to the institution of the suit. We do not think that justice requires us to hold that this suit was prematurely brought and to subject the parties to the additional expenses of a further suit.

It is also contended by appellant that the owners of the leasehold estate are not obligated to pay the items of expense incurred by the lessor for commissions and attorneys' fees and for interest upon the amount of respective sales for taxes and special assessments. We are of the opinion that the items for commission and interest are properly included under the provision of the lease whereby the lessor is entitled to repayment for the entire sum paid by him in purchasing and cancelling any tax title derived under any sale made on account of the non-payment of taxes and assessments. It is contended by appellant that no tax title was purchased but that plaintiff purchased certificates of sale only. These certificates are made assignable by the statute of this state and an assignment thereof vested in the assignee of the right and title of the original purchaser. The Supreme Court of this state has considered the rights of the holder of a tax title in the case of

sufficiency of the notice. It defined a method of serving a notice or demand which, under all circumstances, would be deemed sufficient and valid. This provision does not preclude either of the parties from giving a different kind of a notice and serving the same in a different manner. It does not require that all notices must be given in the manner specified. Consequently we consider the position of appellant untenable, in urging that plaintiff was precluded from maintaining his action by his failure to give a written notice in the manner specified in paragraph 79 of the original lease. It being apparent that the lessee had ample notice and was well aware of their defendants and ample notice and was well aware of their default in respect to the payment of taxes and assessments more than thirty days prior to the institution of the suit. We do not think that [illegible] to hold that this suit was prematurely brought and to subject the parties to the additional expenses of a further suit.

It is also contended by appellant that the owners of the leasehold estate are not obligated to pay the items of taxes and for interest upon the amount of reasonable value for expenses incurred by the lessor for commission and attorneys' fees for collection of the rents. We are of the opinion that the provision of the lease whereby the lessee is entitled to them for commission and interest are properly included under consideration may fix title derived under any sale made on account of the non-payment of taxes and assessments. It is contended by appellant that no tax title was perfected and that their plaintiff purchased certificates of sale only. These certificates are made sufficient and valid. This provision does not preclude either of the parties from giving a different kind of a notice and serving the same in a different manner. It does not require that all notices must be given in the manner specified. Consequently we consider the position of appellant untenable, in urging that plaintiff was precluded from maintaining his action by his failure to give a written notice in the manner specified in paragraph 79 of the original lease. It being apparent that the lessee had ample notice and was well aware of their defendants and ample notice and was well aware of their default in respect to the payment of taxes and assessments more than thirty days prior to the institution of the suit. We do not think that [illegible] to hold that this suit was prematurely brought and to subject the parties to the additional expenses of a further suit.

It is also contended by appellant that the owners of the leasehold estate are not obligated to pay the items of taxes and for interest upon the amount of reasonable value for expenses incurred by the lessor for commission and attorneys' fees for collection of the rents. We are of the opinion that the provision of the lease whereby the lessee is entitled to them for commission and interest are properly included under consideration may fix title derived under any sale made on account of the non-payment of taxes and assessments. It is contended by appellant that no tax title was perfected and that their plaintiff purchased certificates of sale only. These certificates are made sufficient and valid. This provision does not preclude either of the parties from giving a different kind of a notice and serving the same in a different manner. It does not require that all notices must be given in the manner specified. Consequently we consider the position of appellant untenable, in urging that plaintiff was precluded from maintaining his action by his failure to give a written notice in the manner specified in paragraph 79 of the original lease. It being apparent that the lessee had ample notice and was well aware of their de-

Larson v. Glos, 235 Ill., 583, and the language there used implies that a certificate of a tax sale is the equivalent of a tax title and that by the endorsement and delivery of such a certificate of sale the assignee thereof acquires a tax title. We therefore conclude that plaintiff was entitled to recover all moneys paid by him in purchasing a tax title and in cancelling any such title as well as all reasonable expenses incurred by him in so doing, it being provided in the lease that the lessor might advance and pay all money reasonably necessary to make good any default of the lessee. There is no contention or proof but that the payment of commissions was "reasonably necessary" in order to make good the default of the lessee or that the commissions so paid were unreasonable. It is not denied that under the provisions of the lease if plaintiff is entitled to recover, a reasonable allowance should be made for attorneys' fees in this proceeding. The amount of such allowance was stipulated by the parties, and therefore no discussion of this feature of plaintiff's claim is necessary.

We are of the opinion that the judgment of the trial court was in conformity with the law and the evidence, and it is therefore affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

618

159 - 26618

HELEN HOOPER, Administratrix of the estate of Montgomery C. Hooper, deceased,

Appellant,

vs.

ADAMS EXPRESS COMPANY, a corporation,

Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

223 I.A. 6484

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This action was brought by the appellant, who was plaintiff in the court below, to recover damages for the death of Montgomery C. Hooper, alleged to have been caused by the negligence of an employe of the defendant, who was then driving its horse and wagon on Madison street in the City of Chicago at the intersection of that street with Wells street. The declaration contained two counts, in the first of which defendant is charged with negligence in the management and control of the horse and express wagon. The second count charges that defendant caused and permitted the horse and wagon to be driven at an unreasonable and unlawful rate of speed, thereby causing the said horse and wagon to run into the decedent so injuring him as to cause his death. There was a plea of the general issue. The cause was tried before the court and a jury, and at the conclusion of all the evidence the court, on motion of the defendant, instructed the jury to find defendant not guilty, which was done. Motions for a new trial and in arrest of judgment were denied and judgment entered on the verdict.

There was a former trial of this case, resulting in a judgment in favor of plaintiff for the sum of $2500, which was affirmed by this court. Thereupon defendant prosecuted its petition for a writ of certiorari in the Supreme Court,

HELEN HOOPER, Administratrix of the estate of Montgomery C. Hooper, deceased,

Appellant,

vs.

ADAMS EXPRESS COMPANY, a corporation,

Appellee.

COOK COUNTY,

CIRCUIT COURT,

APPEAL FROM

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This motion was brought by the appellant, who was plaintiff in the court below, to recover damages for the death of Montgomery C. Hooper, alleged to have been caused by the negligence of an employe of the defendant, who was then driving its horse and wagon on Madison street in the City of Chicago at the intersection of that street with Wells street. The declaration contained two counts, in the first of which defendant is charged with negligence in the management and control of the horse and express wagon. The second count charges that defendant caused and permitted the horse and wagon to be driven at an unreasonable and unlawful rate of speed, thereby causing the said horse and wagon to run into the deceased to injure him so to cause his death. There was a plea of the general issue. The cause was tried before the court and a jury, and at the conclusion of all the evidence the court, on motion of the defendant, instructed the jury to find defendant not guilty, which was done. Motions for a new trial and in arrest of judgment were leing and judgment entered on the verdict.

There was a former trial of this case, resulting in a judgment in favor of plaintiff for the sum of $2500, which was affirmed by this court. Thereupon defendant procured the petition for a writ of certiorari in the Supreme Court.

which was allowed, and on the hearing in that court the judgments of this court and of the Circuit Court were reversed and the case remanded to the Circuit Court. Hooper v. Adams Express Company, 269 Ill., 169. The opinion of the Supreme Court carefully reviewed the evidence in the case and after a consideration thereof reached the conclusion that plaintiff had failed to show that deceased was in the exercise of ordinary care for his own safety at the time of the accident. This conclusion is predicated upon evidence tending to show that at the time the decedent started to cross Madison street in a northerly direction from the southwest corner of the street intersection, there was standing upon the south side of Madison street an easterly bound streetcar and in front of it a wagon drawn by two ponies. The streetcar and the wagon were awaiting the east and west signal before crossing Wells street. Decedent passed in front of the streetcar between it and the wagon in front of it. From this state of facts the court concluded that the decedent, if he crossed in front of the streetcar before it started, was distant from the street crossing as far as the length of the team of ponies and the wagon, which was in front of the car. On the other hand, if he did not pass in front of the streetcar until after it had started and had moved over this distance to the crossway, he was attempting to cross the street between vehicles moving east and west. These east and west bound vehicles had the right of way, and if decedent went between two of them he could not well have been seen and could not readily see approaching vehicles. The court held that the evidence failed to show that in attempting to cross the street at the time and place and in the manner he did, the deceased was in the exercise of ordinary care for his own safety.

care for his own safety.

the manner he did, the chances were in the direction of a fatality in attempting to cross the street at the time and place in question. The court held that the evidence failed to show that vehicles. The court held that the evidence failed to show that not well have been even and could not reasonably be said light of day, and it deceptive work between two o'clock in the morning moving east and west. There exist two west bound vehicles and the crosswalk. He was attempting to cross the street between vehicles after it had stopped and had moved over this distance to the other bank. If he did not pass in front of the streetcar until from the street crossing as far as the length of the car. In the center and the wagon, which was in front of the car. In the crossed in front of the streetcar before it started, a distance space of three the court commanded that the deceased, if he streetcar between it and the wagon in front of it. From this before crossing fully stood. Deceased passed in front of the streetcar and the wagon were meeting the east and west bound streetcar and in front of it a wagon drawn by two horses. The operating upon the south side of Madison street as regularly bound from the northwest corner of the street intersection, where was deceased started to cross Madison street in a northerly direction preponderated upon evidence tending to show that at the time the his own safety at the time of the accident. This conclusion is to show that deceased was in the exercise of ordinary care for carefully reviewed the evidence in the case and after a consid-

Company, 209 Ill., 169. The opinion of the Supreme Court the cause remanded to the Circuit Court. Moody v. Ottawa Express

wards of this court and of the Circuit Court were reversed and which was allowed, and on the hearing in that court the judg-

It is urged by appellant that the evidence in the last trial of the case shows that deceased in going northerly across Madison street was on the crosswalk at a time when the traffic was passing north and south along Wells street and that it does not show that he passed between the streetcar and the team of ponies and wagon mentioned in the opinion of the Supreme Court above cited. While the opinion of the Supreme Court, based upon the evidence at the former trial, must govern the Circuit Court, in any further proceedings in the case, so far as legal principles were laid down therein, yet the conclusions of the Supreme Court as to matters of fact does not control upon another trial wherein the facts must be determined from the evidence then introduced. Prentice v. Crane, 240 Ill., 250.

The evidence on the part of plaintiff at the last trial of the case consisted only of the testimony of two witnesses, one of whom was the plaintiff. She had no knowledge of the accident and testified only concerning her relationship to the deceased, his age, physical condition, occupation, earning capacity and her loss of support on account of his death and her appointment as administratrix of his estate. Her evidence also established the fact that two of the witnesses at the former trial of the case died prior to the last trial. The other witness testified that he met the deceased at the street intersection mentioned. The traffic at that time was moving north and south on Wells street and the east and west bound traffic on Madison street was halted; that the decedent, accompanied by one Basket (who has since died), started across Madison street on the pedestrians' crosswalk. An east bound streetcar was standing on the south side of Madison street just west of the crosswalk. After decedent had started across

It is urged by appellant that the evidence in the last trial of the case above that deceased in going northerly across Madison street was on the crosswalk at a time when the traffic was passing north and south along Wells street and that it does not show that he pursued between the streetcar and the town of Benton and upon mentioned in the opinion of the Supreme Court above cited. While the opinion of the Supreme Court, based upon the evidence at the former trial, must govern the Circuit Court, in any further proceedings in the case, so far as legal principles were laid down therein, yet the conclusions of the Supreme Court as to matters of fact does not control upon another trial wherein the facts must be determined from the evidence then introduced. Pamplin v. Crane, 240 Ill., 320.

The evidence on the part of plaintiff at the last trial of the case consisted only of the testimony of two witnesses, one of whom was the plaintiff. She had no knowledge of the accident and testified only concerning her relationship to the deceased, his age, physical condition, occupation, nursing capacity and her loss of support on account of his death and her ag eliminate as admissions of his estate. Her evidence also established the fact that two of the witnesses at the former trial of the case died prior to the last trial. The other witness testified that he saw the deceased at the street intersection mentioned. The testimony at the time was moving traffic on Madison street was halted; that the deceased, accompanied by one Burke (who has since died), started across Madison street on the pedestrians' crosswalk. An east bound streetcar was standing on the north side of Madison street just west of the crosswalk. After proceeding and entered across

Madison street the signal was sounded for the traffic to move east and west on Madison street. The witness saw the defendant's horse and wagon standing on the east side of Wells street headed west. As soon as the signal was given for the east and west traffic to move, the driver of defendant's team started up the horses and lashed them with the lines until he got them into a gallop, so that the horses were going at a speed of ten or twelve miles an hour. At the west crosswalk the horses and wagon collided with decedent with such violence that the latter was thrown to the ground and the wheels of the wagon passed over his body, injuring him so severly that he died within a few hours. It is apparent that the evidence upon the last trial of the case differed materially from that which was given at the former trial.

The Supreme Court in deciding the case of Libby, McNeil & Libby v. Cook, 222 Ill., 210, carefully reviewed the prior decisions of the court upon the subject of granting an instruction finding the defendant not guilty at the conclusion of all the evidence, and held that a motion for such instruction should be allowed "where the evidence, with all the legitimate and natural inferences to be drawn therefrom, is wholly insufficient, if credited, to sustain a verdict for the plaintiff," and that the instruction should not be given "except where there is a substantial failure of evidence tending to prove the plaintiff's cause of action or to prove some material fact necessary to establish it," citing authorities. The well established rule is that where "evidence introduced on behalf of the plaintiff, when taken to be true, together with all the legitimate inferences which may be drawn therefrom in favor of plaintiff, tends to support the cause of action set out in his declaration," the motion should not be given. Union Bridge Co. v. Tehan, 190 Ill.,374.

Madison street the signal was sounded for the traffic to move east and west on Madison street. The witness saw the defendant's horse and wagon standing on the east side of Wells street headed west. As soon as the signal was given for the east and west traffic to move, the driver of defendant's team started up the horses and lashed them with the lines until he got them into a gallop, so that the horses were going at a speed of ten or twelve miles an hour. At the west crosswalk the horses and wagon collided with deceased with such violence that the latter was thrown to the ground and the wheels of the wagon passed over his body, inflicting him so severly that he died within a few hours. It is apparent that the evidence upon the last trial of the case differed materially from that which was given at the former trial.

The Supreme Court in deciding the case of Libby, McNeil & Libby v. Cook, 208 Ill.. 216, recently reviewed the prior decisions of the court upon the subject of granting an instruction finding the defendant not guilty at the conclusion of all the evidence, and held that a motion for such instruction should be allowed "where the evidence, with all the legitimate and natural inferences to be drawn therefrom, is wholly insufficient," or that the instruction should not be given "except where there is a total failure of evidence tending to prove the plaintiff's cause of action or to prove some material fact necessary to sustain it," citing Union Bridge Co. v. Tehan, 190 Ill.,379.

We are of the opinion that there was evidence in the record which, standing alone, with all legitimate inferences which might be drawn therefrom in favor of the plaintiff, was sufficient to sustain a verdict in favor of plaintiff. In such a case the jury should have been allowed to pass upon the evidence and the motion for a peremptory instruction should have been denied. Bartelott v. International Bank, 119 Ill., 259; Offut v. Columbian Exposition, 175 Ill., 472. As was said by the Supreme Court in the case of Libby, McNeil & Libby v. Cook, supra, "there may be in a record evidence which, standing alone, tends to prove all the material averments of the declaration and which is therefore sufficient to support, warrant or sustain a verdict in favor of plaintiff, and yet, upon the whole record the evidence may so preponderate against plaintiff that a verdict in his favor cannot stand when tested by a motion for a new trial. * * * A verdict for the defendant should not be directed when there is in the record evidence which fairly tends to prove all the material averments of the declaration."

The judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Cridley, P. J., and Barnes, J., concur.

We are of the opinion that there was evidence in the record which, standing alone, with all legitimate inferences which might be drawn therefrom in favor of the plaintiff, was sufficient to sustain a verdict in favor of plaintiff. In such a case the jury should have been allowed to pass upon the evidence and the motion for a peremptory instruction should have been denied. Mendelovitz v. Jefferson National Bank, 119 Ill. 329; Gilpi v. Columbian Exposition, 129 Ill. 472. As was said by the Supreme Court in the case of Lipps, Morris & Lipps v. Cook, supra, "there may be in a record evidence which, standing alone, tends to prove all the material averments of the declaration and which is therefore sufficient to support a verdict or sustain a verdict in favor of plaintiff, and yet, upon the whole record the evidence may be preponderate against plaintiff that a verdict in its favor cannot stand when tested by a motion for a new trial. * * * A verdict for the defendant should not be directed when there is in the record evidence which fairly tends to prove all the material averments of the declaration."

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

Gridley, P. J., and Barnes, J., concur.

168 - 26827

THOMAS J. RYAN,
Appellant,

vs.

WILLIAM TOBIN, MRS. WILLIAM TOBIN and FRED BRANDT,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

223 I.A. 649

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellant, who was complainant below, filed his bill for an injunction on May 24, 1920. An order granting the injunction was entered on that date without notice to appellees, who were defendants in the court below. They filed their answers to said bill and a motion to dissolve the injunction was made and entered by the court. On November 16, 1920, the bill was dismissed on motion of the complainant and the injunction dissolved. By leave of court, granted November 22, 1920, the defendants on that date filed their suggestion of damages and on November 29, 1920, damages were assessed against complainant in the sum of $150, which he was ordered to pay to the clerk of the court within five days from the date of said order. A reversal of this order is sought in the present appeal. The record contains no certificate of evidence and the appellees have filed no briefs herein.

From the foregoing statement it is apparent that the order assessing damages upon the dissolution of the injunction was entered by the trial court six days after the dismissal of the suit upon the motion of complainant. No order reinstating the cause is shown. The statute of this State prescribed, in substance, that upon the dissolution of an injunction and before final disposition of the suit, upon the filing of written suggestions of damages by reason of such injunction, the court may hear evidence and assess

108 - 26652

THOMAS J. MAIN,

Appellant,

vs.

MINNIE COHEN, WM. ALLMAN
TOBIN and PECK BROADWAY,

Appellees.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Appellant, who was complainant below, filed his bill for an injunction on May 24, 1920. An order granting the injunction was entered on that date without notice to appellees, who were defendants in the court below. They filed their answers to said bill and a motion to dissolve the injunction was made and entered by the court. On November 16, 1920, the bill was dismissed on motion of the complainant and the injunction dissolved. By leave of court, granted November 22, 1920, the defendants on that date filed their motion for damages and on November 29, 1920, damages were assessed against complainant in the sum of $150, which he was ordered to pay to the clerk of the court within five days from the date of said order. Execution was issued upon said order [illegible]. The record shows no [illegible] or evidence [illegible] upon which damages were assessed, but it [illegible] the injunction was [illegible] and there is no bill of exceptions [illegible]. In order [illegible] the writ or the motion of complainant. In order [illegible] the order [illegible] by the [illegible] court six days after the [illegible] of the [illegible] order awarding damages upon a [illegible] the injunction was [illegible] and there is no bill of exceptions [illegible]. In order [illegible] the writ or the motion of complainant. In order [illegible] the order [illegible] by the [illegible] court six days after the [illegible] of the [illegible] order awarding damages upon a [illegible] the injunction was [illegible] by reason of such injunction, it does not [illegible] that evidence and express-

such damages as the nature of the case may require. R. S., chapter 69, section 12. The language is plain that the suggestions must be filed and the damages assessed prior to the final disposition of the suit, which in this case took place on November 16, 1920. In the case of Conway v. Pope, 161 Ill. App., 119, a suggestion of damages was filed after the dismissal of the bill and an order entered striking the same from the files. There was held to be no error in this procedure.

It is well settled that jurisdiction over parties to a cause is terminated by the dismissal of the case. Jurisdiction over them is at an end and they stand as they did before the commencement of the suit. Morgan v. Campbell, 54 Ill. App. 242.

The order of the Circuit court is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

such damages as the nature of the case may require. R. S., chapter 69, section 12. The language is plain that the suggestions must be filed and the damages assessed prior to the final disposition of the suit, which in this case took place on November 18, 1920. In the case of Conway v. Cone, 101 Me., 119, a suggestion of damages was filed after the dismissal of the suit and an order entered striking the case from the files. There can hold to be no error in this procedure.

It is well settled that jurisdiction over matter to a cause is terminated by the dismissal of the case. Jurisdiction over them is at an end and they stand as they did before the commencement of the suit. Morrow v. Dewhirst, 94 Me., 262.

The order of the Circuit Court is reversed.

Briefly, W. J., and Barton, J., concur.

180 - 26840

P. C. MOORE, Doing Business as ELECTRICAL SERVICE & ENGINEERING CO.,
Appellee,

vs.

CHICAGO ELECTRIC CONSTRUCTION CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 640

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought by plaintiff, who is appellee here, to recover the sum of $345 alleged to be due him from defendant as commissions on the sale of a 200 KVA/3 phase Alternator to the Grand Rapids Piano Case Company of Grand Rapids, Michigan. The statement of claim sets forth that it was agreed between plaintiff and defendant that the said machine should be billed to the purchaser for the sum of $1500 less five per cent., one-half of which purchase price to be paid on arrival of the machine and the balance in thirty days "after being in operation;" that the defendant, in consideration of the procuring by the plaintiff of a sale of said machine to said purchaser, was to charge plaintiff for said machine $1200, less 10 per cent. if said Grand Rapids Piano Case Company made the payments as above indicated. It is also alleged that said purchaser paid $1500 for said machine, less five per cent. thereof, or a net sum of $1425, and that there then became due to plaintiff $345, consisting of an item of $225, which was the difference between $1425 and $1200, and an item of $120, being ten per cent. of said sum of $1200.

By its affidavit of merits defendant denied making or having any agreement with plaintiff regarding said sale or any sale, and denied that plaintiff procured said sale for defendant and that there was any indebtedness whatever from defendant to plaintiff. There was a trial before the court without a jury, resulting in a

180 - 26940

P. C. MOORE, doing business as
MIDCONTINENTAL SERVICE & MANUFACTURING
CO.,

Appellee.

vs.

CHICAGO ELECTRIC CONSTRUCTION CO.,
a Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE NORRIS DELIVERED THE OPINION OF THE COURT.

Suit was brought by plaintiff, who is appellee here, to recover the sum of $343 alleged to be due him from defendant on commissions on the sale of a 200 KVA phase Alternator to the Grand Rapids Piano Case Company of Grand Rapids, Michigan. The statement of claim sets forth that it was agreed between plaintiff and defendant that the said machine should be billed to the purchaser for the sum of $1500 less five per cent., one-half of which purchase price to be paid on arrival of the machine and the balance in sixty days "after being in operation;" that the delivery, in consideration of the procuring by the plaintiff of a sale of said machine to said purchaser, was to charge plaintiff for said machine $1500, less 10 per cent. If said Grand Rapids Piano Case Company made the payments as above indicated. It is also alleged that said purchaser paid $1320 for said machine, less five per cent. thereof, or a net sum of $1428, and that there then became due to plaintiff $343, consisting of an item of $255, which was the difference between $1530 and $1500, and an item of $120, being ten per cent. of said sum of $1200.

By its affidavit of merits defendant denied making or having any agreement with plaintiff regarding said sale or any sale, and denied that plaintiff procured said sale for defendant and that there was any indebtedness whatever from defendant to plaintiff.

There was a trial before the court without a jury, resulting in a

finding and judgment in favor of plaintiff for $345. No propositions of law or findings of fact were submitted by either side. A reversal is sought upon the ground that the evidence does not sustain the finding and judgment.

The evidence shows that defendant sold and shipped the machine in question to the Grand Rapids Piano Case Company in January, 1920, pursuant to a written order from that company received by mail. The letter from purchaser to defendant containing said order was dated January 7, 1920, and referred to two letters from defendant to the Grand Rapids Piano Case Company dated January 5, 1920, containing a quotation of price for the machine. The machine was sold for $1500 less a discount of five per cent., making the net price $1425. Plaintiff testified to sundry conversations regarding the sale with different persons who were either officers or employes of the defendant corporation. The testimony of plaintiff as to these conversations is directly contradicted by each of the persons with whom said respective conversations are alleged to have been held. On June 8, 1920, defendant wrote to plaintiff acknowledging receipt of a letter from plaintiff claiming a commission on the sale of this machine. Defendant's letter stated the receipt of the order for the machine from the Grand Rapids Piano Case Company and denied that defendant had ever quoted a price of $1200 less ten per cent., and specifically denied that plaintiff had any connection whatever with the sale of the machine in question to the Grand Rapids Piano Case Company. Copies of sundry letters alleged to have been sent by plaintiff to defendant were received in evidence over the objection of defendant's counsel. No notice to produce the originals of these letters is shown by the record and no foundation appears to have been laid for the admission of the copies. The president of defendant company denied the receipt of any of these letters

finding and judgment in favor of plaintiff for $345. No propositions of law or findings of fact were submitted by either side. A reversal is sought upon the ground that the evidence does not sustain the finding and judgment.

The evidence shows that defendant sold and shipped the machine in question to the Grand Rapids Piano Case Company in January, 1920, pursuant to a written order from that company received by mail. The letter from purchaser to defendant containing said order was dated January 7, 19[illegible], and referred to two letters from defendant to the Grand Rapids Piano Case Company dated January 5, 1920, containing a quotation of price for the machine. The machine was sold for $1300 less a discount of five per cent., making the net price $1235. Plaintiff testified to a number conversations regarding the sale with different persons who were either officers or employes of the defendant for duration. The testimony of plaintiff as to these conversations is directly contradicted by each of the persons with whom said respective conversations are alleged to have been held. On June 5, 1920, defendant wrote to plaintiff acknowledging receipt of a letter from plaintiff claiming a commission on the sale of this machine. Defendant's letter stated the receipt of the order for the machine from the Grand Rapids Piano Case Company and denied that defendant had ever quoted a price of $[illegible] less ten per cent., and specifically denied that plaintiff had any connection whatever with the sale of the machine in question to the Grand Rapids Piano Case Company. Copies of numerous letters alleged to have been sent by plaintiff to defendants were received in evidence over the objection of defendant's counsel. No notice to produce the originals of these letters is shown by the record to [illegible]. It appears to have been held for the defendant [illegible] company. [illegible] defendant company denied the [illegible] of no return

except that of June 4, 1920, which was answered by defendant's letter of June 8, 1920, above mentioned. One of these copies, dated January 15, 1920, sets forth plaintiff's claim substantially as above stated. The receipt of this letter is denied by defendant. Plaintiff does not attempt to prove any further correspondence mentioning a commission on the sale, until the letter of June 4, 1920, above mentioned, wherein plaintiff calls attention to his claim for commissions on this sale, by way of set-off to a claim in favor of defendant and against plaintiff, to which plaintiff's attention had been called by a letter from defendant's attorney.

The evidence, based upon either the alleged conversations or the correspondence, does not show any agreement on the part of defendant to pay plaintiff a commission upon this sale. It is apparent that the minds of the parties never met upon that subject. The finding and judgment of the trial court were contrary to the manifest weight of the evidence.

The judgment of the Municipal court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

except that of June 4, 1980, which was answered by defendant's letter of June 8, 1980, above mentioned. One of these copies, dated January 15, 1980, sets forth plaintiff's claim substantially as above stated. The receipt of this letter is denied by defendant. Plaintiff does not attempt to prove any further correspondence mentioning a commission on the sale, until the letter of June 4, 1980, above mentioned, wherein plaintiff omits attention to his claim for commissions on this sale, by way of not-off to a claim in favor of defendant and against plaintiff, to which plaintiff's attention had been called by a letter from defendant's attorney.

The evidence, based upon either the alleged conversations or the correspondence does not show any agreement on the part of defendant to pay Jarrell a commission upon this sale. It is apparent that the minds of the parties never met upon it & subject. The finding and judgment of the trial court were contrary to the manifest weight of the evidence.

The judgment of the Municipal Court is reversed with a finding of fact.

Reversed. Cause remanded to D. C.

Oxley, P. J., and Barnes, J., concur.

180 - 26840 FINDING OF FACT.

We find as an ultimate fact in this case that there was no contract between the parties for the payment of a commission by defendant to plaintiff upon the sale of the machine mentioned in plaintiff's statement of claim.

ISO - 28840 FINDING OF FACT.

We find as an ultimate fact in this case that there was no contract between the parties for the payment of a commission by defendant to plaintiff upon the sale of the machine mentioned in plaintiff's statement of claim.

189 - 26849

BERTHA SCHECK,
Appellant,

vs.

LOUIS I. GOTTLIEB,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

223 I.A. 649

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The declaration in this case alleges that on July 28, 1919, defendant, without any reasonable or proper cause for so doing, as attorney for Theresa Egerer falsely and maliciously sued out of the Municipal Court of Chicago a writ of capias ad satisfaciendum against plaintiff in a certain suit in said court, wherein said Theresa Egerer was plaintiff and the plaintiff in this suit was defendant, in which a judgment for $200 and costs was adjudged to said Theresa Egerer for her damages in tort, and that pursuant to said writ plaintiff was imprisoned in the Cook County jail until released by due process of law, and that plaintiff was injured in her reputation, character and standing, prevented from transacting her lawful business and was put to great trouble and expense in obtaining her discharge.

A plea of the general issue was filed and a special plea wherein defendant alleged that he was employed by the said Theresa Egerer for the prosecution of the said case in the Municipal Court of Chicago. The plea recites the proceedings in the case, which was in tort, the verdict of the jury and the judgment of the court. It also avers that defendant, under the terms of his employment by the said Theresa Egerer, was entitled to receive fifty per cent of all moneys received and recovered by virtue of said judgment and that thereby defendant

MR. JUSTICE MORRITT DELIVERED THE JUDGMENT OF THE COURT.

The declaration in this case alleges that on July 28, 1919, defendant, without any reasonable or proper cause for so doing, as notified her Imperial Consort Family and wrongfully used out of the municipal funds of Corfu a writ of capias ad satisfaciendum against plaintiff in a certain suit in said court, wherein said Empress Zita was plaintiff and the plaintiff in this suit was defendant, in which a judgment for £500 and costs was ordered to be paid by the plaintiff to the defendant, and that defendant then and there caused said writ to be issued and delivered to the said Sheriff, and that plaintiff was injured in her reputation, character and credit and has been damaged by the premises to the amount of £1000, and that plaintiff from thereafter per Joint Munimus and was put to great trouble and expense in sustaining her credit.

A plea of the General Issue and filed and issued and three Imperial defendant pleaded [illegible] by the said Empress Zita for the prosecution of the said cause in the court, with effect of the said writ in the case, which is now in court, the plaintiff the judgment of the court. It also avers that defendant, under the terms of the agreement by the said Empress Zita, was entitled to receive fifty per cent of all moneys received by virtue of such judgment, and that the defendant is not liable to the plaintiff for the amount claimed.

ICHIN I. SOLNTSEV,
Appellee.

vs.

ABRAHAM SOLOMON,
Appellant.

1919 - No. 2

Appeal from County Court.

Hon. Jno. Geo. Gray,
Judge Presiding.

Opinion filed

became equitably a part owner of the judgment. The plea admits the issuance of the writ of capias ad satisfaciendum and its delivery to the bailiff, after defendant had filed a schedule claiming her exemptions and there had been a return of the execution unsatisfied. A replication was filed denying that plaintiff sued out said writ of capias ad satisfaciendum and delivered the same to the bailiff of the Municipal Court pursuant to his employment as attorney for said Theresa Egerer.

There was a trial before the court and jury resulting in a verdict and judgment in favor of defendant. A reversal of that judgment is sought upon the ground that defendant caused the issuance of the writ of capias ad satisfaciendum and the imprisonment of plaintiff without any reasonable or proper cause. Appellant especially relies upon the contention that the fees of the sheriff for receiving plaintiff and her board at the jail were not paid by the creditor in person but were paid by defendant, who was the attorney for the creditor.

The evidence shows the proceedings in the original suit in the Municipal Court wherein Theresa Egerer recovered a judgment against plaintiff as alleged in the pleadings in this case, the issuance of an execution and its return unsatisfied, the subsequent issuance of the writ of capias ad satisfaciendum and the return thereon that she was released under a writ of habeas corpus. It also showed the employment of defendant as attorney for Theresa Egerer in the original suit and the agreement that defendant as such attorney should have as a part of his fees one-half of the moneys recovered under the judgment; and that the said Theresa Egerer directed defendant as her attorney to pay to the jailer the fees required to be paid by law in such cases, and that she furnished her attorney with money to be so applied.

We understand the law to be that in order to sustain an action for the malicious abuse of legal process, the existence of an ulterior purpose must be shown, and further, there must be some act in the use of the process not proper in the regular prosecution of the case. It has been held repeatedly that the regular and legitimate use of process is not a malicious abuse of such process. Bonney v. King, 201 Ill., 37; Keithley v. Stevens, 238 Ill., 199. The evidence in the case at bar does not show the presence of either of these elements which are essential to the prosecution of an action of this kind. The procedure followed was in strict compliance with the statute.

Regardless of whether or not defendant was the equitable owner of a half interest in the judgment, which does not seem to be denied by appellant, we see no merit in the contention of appellant that the jail fees must be paid by the original judgment creditor. No cause of action accrued to plaintiff merely because these fees were paid to the jailer by defendant as attorney for the judgment creditor and not by the judgment creditor personally. It is a fundamental principle that one who does an act through the medium of another is in law considered as doing it himself. This maxim is especially applicable to the relation of attorney and client. We are of the opinion that the judgment of the Superior Court is in conformity with the evidence in the case and the law applicable thereto.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

199 - 26859

WINFIELD H. SCHENDORF and OSCAR BOENICKE, Doing Business as Schendorf & Boenicke,
Appellees,

vs.

H. P. ART,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

221 I.A. 6494

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim filed October 8, 1920, shows that the action is brought for commissions earned in the sale of certain real estate located at 4120 Ellis avenue, Chicago. The amount of commissions claimed is $220. Plaintiffs claim to have been agents of the defendant in procuring the purchaser. The affidavit of merits alleges that defendant has no acquaintance with plaintiffs or either of them, did not contract with them or either of them to sell the property in question or any property, and further denies that plaintiffs ever performed any services for defendant and denies that he is indebted to plaintiffs in any sum. The case was tried before the court without a jury and resulted in a finding and judgment in favor of plaintiffs for $220. A reversal of this judgment is sought upon the ground that there was no contract between the parties whereby the relationship of principal and agent was created. There appears to be no question as to the amount of the commissions, in case plaintiffs are entitled to recover.

It has frequently been held by this court that in an action to recover real estate brokerage commissions, an employment by defendant to sell the property must be shown and that the mere fact of a real estate agent having been instrumental in finding a purchaser of the property at the price quoted by the vendor does not entitle the

190 - 26830

WINSTON H. KOKKINOS and
OSCAR ROSWICKE, Doing Business
as Edgewood & Roscoe,
Appellees.

vs.

H. P. AST, Appellant.

APPEAL FROM SUPERIOR COURT
OF CHICAGO.

29 I.A. 649

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

Plaintiffs statement of claim filed October 8, 1929, shows that the action is brought for covenants entered in the sale of certain real estate located at 4120 N. La Crosse, Chicago. The amount of covenations claimed is $500. Plaintiffs claim to have been agents of the defendant in procuring the purchaser. The affidavit of merits alleges that defendant has no defenses with plaintiffs or either of them, did not contract with them or either of them to sell the property in question or any property, and further denies that plaintiffs ever performed any services for defendant and denies that he is indebted to plaintiffs in any sum. The case was tried before the court without a jury and resulted in a finding and judgment in favor of plaintiffs for $[illegible] . Reversed of this judgment is sought upon the ground that there was no contract between the parties whereby the relationship of principal and agent was created. There appears to be no question as to the amount of the commissions, in case plaintiffs are entitled to recover.

It has frequently been held by this court in an action to recover real estate commissions [illegible] by defendant to sell the property owner to whom it [illegible] of a real estate agent having been instrumental in finding a purchaser of the property at the price stated by the owner does not entitle the

agent to a commission unless he is able to show his employment by the owner for the purpose of effecting the sale. Bunn v. Smith, 190 Ill. App. 530; Morton v. Barney, 140 Ill. App. 333; Wilcox v. Andrews, 150 Ill. App. 27. It is also true that in an action of this kind the burden is upon the plaintiffs to prove the contract upon which they rely. Jackson v. Kohler, 289 Ill. 444. On the other hand, it seems to be equally well settled that a real estate broker who has commenced negotiations for the sale of the property of his principal which finally result in a sale cannot be deprived of his commissions because the owner took up and completed the negotiations directly with the purchaser. In Hafner v. Herron, 165 Ill. 242, it is held that it is not always necessary that the purchaser should be actually introduced to the owner provided it appears affirmatively that the purchaser was induced to apply to the owner through the instrumentality of the broker or through means employed by the broker, and that where the seller consummates a sale of property even upon different terms that those proposed to his agent, the latter will not be deprived thereby of his commissions. If plaintiffs were employed by defendant to find a purchaser for the property and through their efforts the owner was brought into communication with the purchaser, plaintiffs could not be deprived of their commissions because the owner of the property completed the negotiations himself or through others. Rigdon v. More, 226 Ill. 387.

The evidence in this case shows that defendant owned the property in question and that he sold the same to Cora Elizabeth Brown on March 5, 1920. Plaintiffs were engaged in the real estate business in Chicago at the time the negotiations took place. One J. M. Thompson was in charge of plaintiffs' office on Forty-third street at that time. Thompson testified that he called at defendant's residence and was informed by defendant's wife that the house

agent to a commission unless he is able to show his employment by the owner for the purpose of effecting the sale. Munn v. Smith, 190 Ill. App. 330; Norton v. Barney, 140 Ill. App. 222; Silvox v. Vandrew, 180 Ill. App. 27. It is also true that in an action of this kind the burden is upon the plaintiffs to prove the contract upon which they rely. Jackson v. Kohler, 289 Ill. 444. On the other hand, it seems to be equally well settled that a real estate broker who has commenced negotiations for the sale of the property of his principal which finally result in a sale cannot be deprived of his commissions because the owner took up and completed the negotiations directly with the purchaser. In Bethge v. Norton, 188 Ill. 242, it is held that it is not always necessary that the purchaser should be actually introduced to the owner provided it appears affirmatively that the purchaser was induced to apply to the owner through the instrumentality of the broker or through some agency employed by the broker, and that where the seller consummates a sale of property even upon different terms that those proposed to him a out, the latter will not be deprived thereby of his commissions. If plaintiffs were employed by defendant to find a purchaser for the property and thereby their efforts to that end were brought into communication with the purchaser, plaintiffs could not be deprived of their commissions because the owner of the property completed the negotiations himself or through others. Higdon v. Lyle, 286 Ill. 327.

The evidence in this case shows that defendant owned the property in question and that in April 1920 he came to Chicago. He arrived at that time. Thompson testified that he called at defendant's residence and was informed by defendant's wife that the house was for sale. Thompson testified that he called at defendant's office on North Clark street on the first two occasions he was in Chicago. One occasion was in charge of a 'cutie' office on North Clark street. K. Thompson was in charge of it. Plaintiffs were employed by the real estate broker on March 3, 1920.

was for sale but was referred to defendant with reference to the price. Later in the day he had a telephone conversation with defendant in which defendant stated that his price was $4500 cash. The witness told defendant that he had a purchaser for $3800, but defendant refused to consider this offer and told him to go ahead and get $4500. He stated that he showed the premises to a number of prospective customers between September, 1919, and January, 1920, and always saw defendant's wife whenever he visited the house with such customers. On January 20, 1920, he had an interview upon the subject with a Mrs. Brown, who subsequently purchased the house. She came to his office looking for a house to buy and he took her over to defendant's residence but did not go into the house with her, telling her that the house was for sale and suggesting that she go in and have a look at it. Later he had a conversation with defendant over the telephone, who said that Thompson's buyer had been there and looked the place over and said, "It looked like they mean business." Defendant then stated that he did not want to sell the house for $4500 and pay a commission. Thompson then told defendant that if he was unwilling to sell for $4500, "We will have to look for a better buyer." Defendant denied any dealings with Thompson and expressly denies that Thompson sent Mrs. Brown to him. Defendant's wife corroborates defendant's testimony to some extent, although admitting that she had had conversations with Thompson regarding the sale of the house. Mrs. Brown, the purchaser, testified to a conversation with Thompson in which he had discussed with her the purchase of defendant's property but did not urge the purchase of it because she was not prepared to pay $1,000 in cash on the purchase of the property. She says that Thompson told her it was no use for her to look at the property unless she could pay "$1,000 down." She then stated that she would

was for sale but was referred to defendant with reference to the price. Later in the day he had a telephone conversation with defendant in which defendant stated that his price was $4500 cash. The witness told defendant that he had a purchaser for $3800, but defendant refused to consider this offer and told him to go ahead and not $4500. He stated that he showed the premises to a number of prospective customers between September, 1919, and January, 1920, and always saw defendant's wife whenever he visited the house with such customers. On January 20, 1920, he had an interview upon the subject with a Mrs. Brown, who subsequently purchased the house. She came to his office together with defendant for a time to buy and to look her over to defendant's residence but did not go into the house with her, telling her that the house was for sale and suggesting that she go in and have a look at it. Later he had conversation with defendant over the telephone, at which time defendant's lawyer had been there and looked the place over and told him, "It looked like they mean business." Defendant then stated that he did not want to sell the house for $3800 and put a condition. Thereupon they told defendant that it be was unwilling to sell for $4500", "it will have to look for a better buyer." Defendant de ing any dealings with Thompson and he nearly twelve that January [illegible] to him. Defendant's [illegible] to complete [illegible] January, some extent, although [illegible] had discovered with her the price of defendant's property but did not urge the completion of the purchase. Later, then, the purchaser, qualified to a conference with Thompson and the owner, pay $1,000 in cash on the [illegible] and the property

examine the property. Thompson went with her but there was nobody at home. The next day she went back and defendant's wife referred her to Mr. Apt. Later she had an interview with Mr. Apt and told him that Mr. Thompson had informed her about the house, although she had known about it before, having learned that it was for sale from conversation with one of the neighbors.

In view of this conflicting testimony as to the business transactions between the parties and the negotiations with the purchaser which finally culminated in a sale, we are not justified in holding that the judgment of the Municipal court was contrary to the manifest weight of the evidence or that the court erred in holding that the relationship of principal and agent existed between the parties.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

examine the property. Thompson went with her but there was nobody at home. The next day she went back and defendant's wife referred her to Mr. Apt. Later she had an interview with Mr. Apt and told him that Mr. Thompson had informed her about the house, although she had known about it before, having learned that it was for sale from conversation with one of the neighbors.

In view of this conflicting testimony as to the substance transactions between the parties and the negotiations with the purchaser which directly culminated in a sale, we are not justified in holding that the judgment of the Municipal Court was contrary to the manifest weight of the evidence or that the court erred in holding that the relationship of principal and agent existed between the parties.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

Beginning 3rd Dist.

General No. 7207 Agenda No. 3

October Term, 1920

Wabash Railway Company, a corporation
Plaintiff in Error

vs.

229 I.A. 650

A. E. Staley Manufacturing Company, a corporation
Defendant in Error

Writ of Error to the circuit court of Macon County.

GRAVES P. J.

Plaintiff in error is a railroad corporation and defendant in error is a manufacturing corporation and had railroad tracks on its private property which it was desired by both parties should be used by plaintiff in error in handling freight shipped to and from the plant of defendant in error. For the purpose among other things of fixing the rights and liabilities of these two corporations in regard to the use of such railroad tracks by plaintiff in error, a contract in writing was enteredi nto between the parties whcih among other things contained the following stipulation:

"The Manufacturing Company agrees that it will maintain the said system of railroad tracks constructed upon its property as aforesaid, in good operating condition; and will indemnify and hold harmless the Wabash Company from all claims for loss or damage to persons or property, which may arise from or be caused by the sole negligence of the Manufacturing Company, its agents, servants, or employees, or solely by reason of the failure of the Manufacturing Company to perform the covenants of this agreement on its part to be performed."

Thereafter a gate post was placed by defendant in

error on its premises so close to the railroad tracks there as to render the use of such tracks by plaintiff in error for the purposes mentioned unsafe for the servants of plaintiff in error of which facts plaintiff in error had knowledge. Thereafter a servant of plaintiff in error was killed by reason of the dangerous condition created by the presence of such post there. The administrator of such deceased servant sued plaintiff in error and recovered a judgment against it for negligently causing the death of such servant, which judgment was paid by plaintiff in error after it was affirmed by the Supreme Court. The suit at bar was brought by plaintiff in error in assumpsit to recover under the contract mentioned the money expended in such litigation and in liquidating such judgment. All of the foregoing facts are suf-

ficiently disclosed by the declaration filed in this case. A demurrer to that declaration was sustained by the circuit court and judgment was there entered against plaintiff in error in bar of its action and for costs. This writ of error has been sued out to reverse that judgment.

Several special causes for such demurrer were assigned,

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only part of which need be noticed in this opinion. The main reliance of defendant in error to sustain the judgment is placed on the contention that the contract sued on provides for indemnity by defendant in error, only when loss is suffered by plaintiff in error arising from or caused by the sole negligence of defendant in error, its agents or servants, or solely by reason of its failure to perform its covenant in that contract contained, and that the accident made the basis of the suit was not caused solely by reason of the failure of defendant in error to perform its part of the agreement or by the sole negligence of defendant or its agents, servants or employees, but was due in part to the negligence of plaintiff in error in operating its train in a dangerous proximity to the post in question.

Th right of the parties to make the contract in question and its validity are vouched for by plaintiff in error by bringing suit thereon. A party to a contract cannot at the same time rely on it for a right of recovery and deny its validity where such right is limited by its terms. It therefore remains for this court to determine what that contract means and what the facts are that are shown by the averments.

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There are no new or unusual rules of construction to be applied to this contract. It, like other contracts must be so construed as to give effect to the intention of the parties if the same can be done without doing violence to the language employed. It will not be construed to be a contract to indemnify one of the parties to it against loss or injury resulting from its own negligence unless the purpose to do so is apparent from the express terms of it. (See **Ruling Case Law,** Vol. 14, page 47, Sec. 5, and cases there cited.) There is nothing in this contract that even remotely suggests the possibility that it was intended by the parties to it that defendant in error undertook to indemnify plain-

tiff in error against loss or damage resulting to it by reason of its own negligence or the negligence of its agents or servants; but on the contrary such indemnity is expressly limited to such damage as shall result from or be caused by "the sole negligence" of defendant in error, its agents, servants or employees, or solely by reason of its failure to perform the covenants in the contract to be kept and performed by it.

The declaration in the case at bar clearly shows that

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the damages for which the judgment was rendered against plaintiff in error, for the money expended in the payment,of which, it now seeks reimbursement, were caused by the negligence of plaintiff in error in operating its train in dangerous proximity to the post in question, an entirely seperate and distinct negligence from the act of placing the post in the improper position. It follows that the damages for which the judgment in question was rendered were not caused solely by reason of the failure of defendant in error to perform its part of the contract sued on or by the sole negligence of defendant in error or its agents, servants or employees, and were not such damages as were covered by the said contract.

Whether or not there might have been a common law right on the part of plaintiff in error to require defendant in error to contribute or indemnify it in case there had been no contract is not involved in this litigation, first because this suit is not based on a common law liability, and second because the contract covers the entire scope of liability for reimbursement and limits as well as establishes such liability to that

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fixed by the terms of the contract.

The demurrer to the decaration was properly sustained. The judgment of the circuit court is affirmed.

Judgment affirmed.

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General No. 7219 Agenda No. 9

October Term, 1920

Dorothea J. Murphy, Defedant in error

vs.

Walker D. Hines, Director General of Railroads, operating Chicago & Alton Railroad, Plaintiff in Error

Error to the Circuit Court of Macoupin County.

GRAVES P. J.

Dorothea J. Murphy brought suit in the circuit court of Macoupin County against Walker D. Hines as director general of railroads, operating the Chicago & Alton Railroad, and recovered a judgment for $500, to reverse which Hines sued out a writ of error from this court.

The evidence shows that defendant in error was driving an automobile along a public street in the Village of Nilwood in this state and while in the act of crossing the tracks of the plianifft in error was struck by a locomotive drawing a heavy freight train of the plaintiff in error and was injured. There seems to be no conflict over the claims made by defendant in error that she was injured, and that there was an ordinance of the village in force at the time limiting the speed of freight trains to eight miles per hour.

Plaintiff in error bases its right to a reversal of the judgment upon two claims, viz: that the speed of the train,

though excessive, was not the proximate cause of the injury; and that defendant in error was guilty of contributory negligence.

The trial court in an instruction told the jury that to warrant a verdict against the railroad company the negligence of its servants must be the sole and proximate cause of the injury, unassisted by any negligence on the part of the plaintiff and that if this was not true they must find the issues in favor of the defendant. In other instructions the jury was also told that the alleged negligence of the railroad servants to warrant a recovery must have approximately cause the collision. No instruction was given by the trial court to qualify in any way the statements of law as above quoted in substance; so it was clearly explained to the jury that the act of negligence upon the part of the railroad company must have been the proximate cause of the injury.

This court is now asked to find and determine, upon a review of the evidence, as a matter of law, that the

speed of the train, although admitted to be excessive, was not the proximate cause of the injury. The ordinance of the village governing the speed of freight trains running through the vil-

Page 2

lage, limited the speed of such trains to eight miles per hour, while the speed of the train that caused the injury was from twenty to twenty-five miles per hour, as admitted in the brief of plaintiff in error.

Defendant in error was used to driving an automobile, having driven one for about three years previously; she had just been out of her car at a nearby store and at the time of the collision she says she was running her car at a slow rate of speed, and in this she is corroborated by other witnesses.

While many of the facts pertaining to the collision were in dispute, a fair review of the evidence leads us to believe that the jury were not unwarranted in finding that the excessive speed of the train was the proxmate cause of the injury. If the train had been moving at eight miles per hour only, there is reason to believe that a collision would have been avoided. This issue was one of fact for the jury to determine.

Plaintiff in error also contends that defendant in error was guilty of contributory negligence to such a degree that no recovery by her can be sustained. It seems from the

Page 3

evidence that defendant in error, with her mother, drove her car in to Nilwood from the east and stopped at a store about sixty or seventy feet east of the railroad crossing, and on the south side of the street on which she was going westerly. The railroad was south of this store and ran at an angle across the street on which was the crossing it and where she was injured and that the view southerly or south, from which direction the train was approaching the crossing, was to some extent obstructed. Defendant in error, as well as some of her witnesses, testified that she looked towards the south in approaching the crossing and that she was driving her car at a slow rate of speed. The evidence was conflicting as to just what took place at the time of the collision and it would serve no good purpose now to canvass the testimony on that subject at length. It is sufficent to say that if the jury believed

General No. 7222 Agenda No. 12

October Term, 1920

Martha M. Logan, Appellee

vs.

The Mutual Life Insurance Company of New York

Appellant

Appeal from the Circuit Court of Moultrie County.

GRAVES, P. J.

Martha M. Logan brought suit in the Circuit Court of Moultrie County against The Mutual Life Insurance Company of New York to recover the amount claimed to be due her upon a policy of insurance alleged to have been issued by the Insurance Company to William H. Logan, husband of said Martha M. Logan, for the sum of $10,000. A trial was had before a jury and a verdict returned in favor or said Appellee in the sum of $10,000 and interest. Motion for a new trial was made by the Insurance Company, which the court overruled and entered judgment upon the verdict; from which judgment the Insurance Company has appealed.

The main question involved is whether or not the policy of insurance was delivered to William H. Logan as an existing contract of insurance, or whether it was in his hands for examination and determination by him as to whether or not he would accept and pay for the same.

This policy of insurance was dated on the 15th day of January, 1917, and William H. Logan died on the 20th day of the same month. At the time of his death the policy was in the possession of Logan or his wife, but no premium had in fact been paid, although the policy contained an acknowledgment of the receipt of the first annual premium.

Appellee claims that the delivery of the policy was complete; while Appellant insists it was not delivered as a binding contract but was delivered to Logan for his examination and determination as to whether or not he would pay the premium and retain the policy as his own.

The application for insurance was in the usual form and made before the company's medical examiner and contained this clause: "The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and re-

ceived by me, during my continuance in good health."

Two agents of the Appellant, who knew that Logan held another insurance policy for $5000 in the Appellant company, and who were advised by Logan that he had $10,000 insurance in two other companies, solicited him to take out a new policy in the Appellant company and to submit to an examination by their medical examiner, and make a written application for the insurance involved. Appellee, upon the trial, testified that the policy was handed to her by Logan at their home three days before he died; that she took the policy and put it in a bookcase where it remained until after the death of Logan, when proof of death was made and liability denied by the Insurance Comapny.

On behalf of the Insurance Company Malcom McQuarrie, agent of the company, testified that when he, the witness, and a Mr. Strathern, also an agent for the Insurance Company, called upon Logan to talk over the matters of insurance, Logan said he was carrying all the life insurance he thought he would carry and that he objected to being examined for any more, and said he would not take out another policy, but when he was assured that it would cost him nothing to be examined and that taking the examination would not obligate him to take more life insurance, he said he would be examined, and did so; that nothing was said at any time about any credit being given or time of payment extended upon the first premium due upon the policy. He also says the talk with Logan and the examination proposed were for the purpose of determining whether or not Logan was physically fit to take out life insurance. He further says that the amount of insurance

put in the application was not suggested by Logan, but that the suggestion came from the two agents of the Insurance Company based upon their information concerning Logan's financial standing.

The witness Coffey, who conducted the medical examination for the Insurance Company, testified that Logan came to his office to be examined; that after the conclusion of the examination Logan said he was not ready to sign the application but was willing to sign the medical part; that Mr. Strathern came in and witness told him that Logan refused to sign the application; that

Strathern then said "that Logan ought to sign in order that I should be paid for my medical examination;" and that he, Logan, would be under no obligation to the company until the policy was paid for and delivered; that Logan then signed the medical examination.

The witness Strathern testified that he suggested to Logan that he be examined for more insurance; that Logan said he thought he had all the insurance he ought to carry; that he, Strathern, then said to Logan that no financial responsibility would be incurred by an examination and that Logan would be under no obligation unless a policy was delivered and paid for; that afterwards at the office of the medical examiner he read to Logan from the insurance policy the clause "The proposed policy shall not take effect until the first premium has been paid during my continuance in good health and unless also the policy has been accepted by me" and that he then said to Logan, "If you sign this application the doctor can get his fee and if you do not sign it he will get no fee;" Logan then said, "If that is the case I will sign." The witness further testified that no premium was paid; that nothing was said about the payment of any premium; that no note or obligation of any kind was given and that no credit was mentioned. This witness also testified that in fixing the amount of the insurance in the policy at $10,000 he and McQuarrie looked up Logan's financial rating and figured on that basis, thinking Logan could afford to take that amount and that nothing was said between them and Logan as to the amount.

This in substance was the evidence that we regard as material, tending to show the character of the delivery of the policy to Logan. From a consideration of the evidence as a whole, it is manifest that a preponderance of it is not in favor of the delivery of the policy to Logan as a contract of insurance. To constitute this policy a contract of insurance, Logan must have assumed some liability or obligation. It could not have been intended that the policy would bind the Insurance Company in case of Logan's death and have no force whatever in case he continued in health.

Appellee, however, contends that since the policy of insurance contains the clause "the receipt of which (the first premium) is hereby acknowledged," the company is estopped from proving that no payment in fact was

made and therefore delivery will be presumed. The rule is that possession of a policy by the insured or the beneficiary named therein, containing a recital of payment of the premium, is **prima facie** proof of payment and delivery, but that it is not conclusive of those facts and may be overcome by proof that it was not paid for or delivered as a contract of insurance.

In the case of **Adams, Administrator v. The Columbian National Life,** 191 Ill. App. 378, cited by Appellee, it was held to be against public policy to allow an insurance company to deny payment of the premium contrary to the terms of the policy, **if the policy has been actually delivered,** as a contract of insurance.

In the case of **The Massachusetts Benefit Life Association v. Sibley,** 158 Ill. 441, also cited by Appellee, where a like clause as to first payment was involved, while it was contended that the first payment had not been made, the question of actual delivery was not in doubt. The court there held that there was **prima facie** proof of first payment and delivery which might become conclusive upon the insurer if the policy was actually de livered as a contract of insurance.

The judgment of the Circuit Court is, therefore, reversed with a finding of fact to be incorporated in the judgment of this court that the policy of insurance sued on was never delivered to or accepted by William H. Logan as a contract of insurance.

Judgment Reversed with finding of fact.

General No. 7230 Agenda No. 18.

October Term, 1920

Clara Leonard, Appellant

vs.

Lee Mockbee, Appellee

223 I.A. 650

Appeal from the circuit court of Vermilion County

GRAVES P. J.

This is an action in forcible entry and detainer. Appellant was plaintiff in the **nici prius** court. She is the owner of the premises involved in the litigation. Appellee was in possession of the premises as tenant under appellant. The lease was in writing and provided that appellee should have the premises from March 1, 1915 to March 1, 1920, and contained the following stipulation as to a renewal of the same:

"Second party having the privilege of renewing said lease for a period of five years on the same terms and conditions, provided said second party gives notice in writing to said first party of his intention to renew the same six (6) months or more prior to the expiration of said lease and provided said first party is living at the time."

On September 5, 1919, appellant served appellee with a notice in writing that as he had failed to give her notice in writing six months or more prior to March 1, 1920, at which time his lease would expire of his intention to renew the same, he would be required to surrender possession of the premises

to her at the expiration of his lease on March 1, 1920. On March 4, 1920, appellee not having surrendered possession of the premises to appellant she began this suit in the circuit court of Vermilion County. The declaration was in the usual form and the plea was the general issue.

It is not claimed that appellee served appellant with notice of his desire to renew the lease six months or more prior to March 1, 1920, but on the contrary it is conceded that no such notice was served. He now claims he had such a notice prepared on August 30, 1919, and that he went to a public gathering where he saw appellant at a distance but did not serve it; that August 31, 1919, was Sunday; that he attempted to find her on Monday September 1, 1919, but failed and that he served her with the notice on September 2, 1919. In his argument in this court he claims that appellant concealed herself to avoid the service of notice and that she waived the

General No. 7237 Agenda No. 24

October Term, 1920

A. L. Brown and Mary J. Brown, Defendants in Error

vs.

Roy E. Wilson, Plaintiff in Error.

Writ of error to the County Court of Sangamon County

People, ex rel Roy E. Wilson, Plaintiff in Error

vs.

A. L. Brown and Mary J. Brown, Defendants in Error

Writ of error to the Circuit Court of Sangamon County.

GRAVES, P. J.

Roy E. Wilson instituted a proceeding by habeas corpus in the circuit court of Sangamon County against A. L. and Mary J. Brown to obtain the custody of his minor daughter, Dorothy, whom he alleged was wrongfully withheld from him by the said A. L. Brown and Mary J. Brown, the grand-parents of the said Dorothy. About the same time, the grand-parents commenced proceedings in the county court of Sangamon County to adopt the said Dorothy. Issues were closed in both cases and such action had that the writ of habeas corpus was denied in the circuit court, while the county court ordered that Dorothy be adopted by the said grand-parents. A writ of error was prosecuted by said Roy E. Wilson from the order in each of such proceedings and by agreement of the parties the two

cases are here consolidated and treated as one.

The question involved is whether or not Dorothy, the minor daughter of said Roy E. Wilson, can be adopted by her grand-parents without the consent of and against the protest of her father upon the grounds set up in the proceedings in the county court, viz; that he had abandoned Dorothy for a period of six months or that he was an unfit person to have the control and custody of said child.

Dorothy at the time of the hearings was eight years old; her mother had died leaving her and two other daughters, one five and the other three years of age. Dorothy at the time of the death of her mother was in the custody of her grand-father and grand-mother, i. e.: her mother's father and mother, and was there at the

time these proceedings were instituted. Roy E. Wilson demanded the custody of Dorothy from the grand-parents and upon refusal filed the petition for habeas corpus, and about the same time the county court of Sangamon County ordered the adoption of Dorothy by the said grand-parents.

In the hearing in the county court upon the petition to adopt, the finding was that "the father of said child has

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abandoned and deserted said child for a period of six months next preceeding the filing of the petition in this case and that it would be to the best interest of the said child to be and become the adopted child of the petitioners." In the circuit court the custody of the child was committed to the grand-parents with no finding of fact as to the unfitness of the father, or that the father had abandoned and deserted the child.

The law that a father has the right to the custody of his child as against all others, except the mother, unless he has forfeited that right or the welfare of the child's demands that because of unfitness he should be deprived of it, is too well established to make it necessary to cite any law other than our statute. Under our statute, Sec. 3, Chap. 4, governing the adoption of children, the law's requirements are, so far as applicable here, that the child must be abandoned or deserted for six months or that the parent is unfit to have the custody of the child. The question involved is not whether under the evidence the child might be better off with the grand-parents than with the father, for every fit man, even in poverty, has the right to the custody of his child even though it grand-parents

Page 3

may be able to

offer the child a better home.

The evidence in this proceeding is in a very narrow compass. The most than can be fairly claimed for it is that the father, Wilson, after his wife's death allowed Dorothy to remain with the grand-parents for a considerable time and did not contribute to Dorothy's support as much as her grand-mother thought right, though the grand-father says he never asked Wilson to contribute to the support of Dorothy. There seems to have been no competent evidence that Wilson is not a fit man to

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General No. 7243 Agenda No. 30

October Term, 1920

George W. Taylor, Appellee

vs.

Frank Rowden, Appellant

223 I.A. 651 2

Appeal from the circuit court of Jersey County.

GRAVES P. J.

George W. Taylor brought suit in the circuit court of Jersey County against Frank Rowden to recover for commissions alleged to have been earned by Taylor upon the sale of a farm owned by Rowden. A verdict was returned in favor of Taylor in the sum of $5000 upon which a judgment was rendered, from which an appeal has been taken to this court.

Appellant presents two questions for review, viz: whether or not appellee's employment as a real estate agent for appellant had been terminated and ended by appellant before the sale involved was undertaken or made, and whether or not the contract sued on was one between appellant and Taylor alone or was a contract between appellant on one side and Taylor and one Clark jointly on the other.

There is no question that Taylor was, at one time, employed to sell Rowden's farm and that he undertook to do so and associated H. H. Clark with him in that undertaking, and that

he did some advertising and for a time had a prospect of sale. Every attempt upon his part, however, proved unavailing and seems to have ended when a deal prosposed between Rowden and one Solomon fell through. This deal was attempted to be negotiated on the part of Solomon early in the year 1918 by the Paul Jones Realty Company of St. Louis, with which company Taylor had had some considerable correspondence and with whom he also had several interviews. An earnest effort was made by both Taylor and the Paul Jones Company to interest Solomon, who at one time seemed disposed to make a trade for apeplant's farm. The efforts upon the part of appellee to close this deal ran through a period of several months and finally came to an end in July with nothing accomplished. When it was found that the Solomon deal could not be effected, Rowden seemed to have determined to make no further ef-

fort at that time to sell his farm and, in our judgment upon the evidence, ended Taylor's authority to sell.

On this subject Rowden testified that his first talk with Taylor was in February, 1918, and that in May following

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he went with Taylor to see Clark at Wood River when he made a contract with both Taylor and Clark to engage in the sale of his farm; that about the first of June, Taylor made a trip to St. Louis and when he returned reported to Rowden that he had seen the Paul Jones Realty Company, and about July 1st told Rowden that he would bring a buyer for the farm; that the Prospective buyer, Mr. Solomon, came to see the farm in the latter part of July and at that time Rowden told Solomon that if he bought he must do so soon as he, Rowden, was going to make some expenditures in connection with the farm if he did not sell. Rowden further testified that about August 30th, 1918, he was in the office of the Paul Jones Company and was there advised that the Solomon deal was off, whereupon he, Rowden, said he had bought a mill property, was going to build some sheds and a silo and was going to buy a tractor and that his farm, from that time, was off the market; that upon his return to his home about September 1st he saw Taylor and told him of his visit to the Paul Jones Company; that the Solomon deal was off and that his farm was off the market. Rowden further testified that about September 1st he wrote Clark that his farm was

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off the market; that he also went to Taylor's place of business and told him that his farm was off that market and that after that time he never had any conversation with Taylor about the sale of the farm. This witness further testified that on the 28th of December, 1918, to close negotiations begun the latter part of November, he sold his farm through the agency of the Paul Jones Company to Major Britton and that he had paid said Paul Jones Company a commission on such sale of $8500.

James C. Campbell testified that in the office of the Paul Jones Company in either June or July, 1918, when Rowden was informed that the Solomon deal was off, Rowden said, "If I cannot make it now my farm is off the market." This witness further testified that

after the Solomon deal was declared off Taylor was in the office of the Paul Jones Company and that he, Campbell, then told Taylor that Rowden had been in the office some two weeks berore and there said his farm was off the market and that Taylor replied, "I know it," and proposed to revive the Solomon deal.

Harry A. Forward, an employee of the Paul Jones Company, testified that Rowden was in the office of the Paul

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Jones Company on August 30, 1918, when he was advised that the Solomon deal was off and that whereupon Rowden said he had bought some implements and tractors and had made some improvements on the farm and that his farm was off the market and not for sale; that soon after the 14th of September, 1918, Taylor was in the office of the Jones Company and wanted to call on Solomon when the witness, Forward, said to him that Rowden had informed the Jones Company that his farm was off the market and that he had so notified us (the Jones Company) over the telephone; that Taylor then said he was notified the same, but he hoped to get Solomon to make some proposition that Rowden would consider.

H. H. Clark, with whom Taylor was in a way associated in his effort to sell the Rowden farm, testified that in a letter to him (Clark) Rowden withdrew the farm from sale. A letter was put in evidence showing that on the 31st of August, 1918, the Paul Jones Company advised Taylor that "the Solomon deal was entirely off."

Taylor in rebuttal testified that no-one in the Paul Jones office ever stated to him that Rowden had been in the of-

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fice of the Company and had said that he had taken his farm off the market. He also denied that Rowden had said to him that his, Rowden's farm was taken off the market and was not for sale.

This was in substance the material evidence upon this branch of the case and from a fair consideration of it we cannot see how it can be said that the verdict is supported by the greather weight or preponderance. On the contrary it is manifestly against the weight of the evidence.

Taylor and Clark had a common interest in the sale of Rowden's farm and made, for a while, a common ef-

General No. 7249 Agenda No. 66

October Term, 1920

John R. Abbott, Appellee

vs.

The County of Adams, et al., Appellants

Appeal from the Circuit Court of Adams County

GRAVES, P. J.

This is a bill filed by Appellee to restrain the carrying out of a contract made between the County of Adams and one John T. Inghram, whereby he was employed to perform certain services for the County as an Attorney, for which specified services the said County agreed to pay him a stipulated salary. A demurrer to the bill was sustained by the Circuit Court and the Complainant stood by his bill and the same was dismissed for want of Equity, whereupon he brought the case here on appeal. The order of the Circuit Court sustaining the demurrer and dismissing the bill was reversed by this Court and the cause was remanded to the Circuit Court with directions to overrule the demurrer. The opinion filed by this Court at that time is reported in **Abbot v. Adams Co.** et al, 214 Ill. App. 201 where a complete statement of facts as they then were, may be found. After the cause was reinstated and the demurrer to the bill as it then stood had been overruled pursuant to the mandate of this Court, defendants, Will J. Smith, County Clerk, John T. Inghram, Edward W. Peter, County Treasurer, and the County of Adams each filed seperate answers to the bill in which all of the material averments of fact in the bill are admitted and it is averred that Rule 18 of the Board of Supervisors of said Adams Coun ty had been abolished by the said Board and that the finance committee of the said Board had been empowered to employ "all legal counsel they deemed necessary," and that acting under the power so conferred upon it, the said committee, the said Board concurring therein, had employed the said John T. Inghram to render for the said County certain services specified in a report made by that committee; that the said Inghram was not then acting as Attorney for said County under

Rule 18 but was then acting under a contract with the finance committee of the Board of Supervisors of Adams County, whereupon Appellee by leave of Court filed his supplemental bill

in which he alleges in addition to the averments in the bill that was formerly before this Court that the Board of Supervisors of Adams County had repealed Rule 18 referred to in the original bill and had passed a resolution attempting to vest in the finance committee of the said Board power to employ and retain legal counsel, and that the said Board acting through its said finance committee had entered into an illegal contract with the said Inghram whereby he was employed and retained as a pretended counsel for the said County at a monthly salary of not to exceed $150 per month to be paid in cash by the said County, the said Inghram to maintain his office in the Court House of said County, which office is to be maintained and furnished to him free of expense and at the expense of the said County, by which contract the said Inghram was to represent and act for the said County in all legal matters and proceedings then pending and which might arise during the vacation of the Board, and to render all legal services to the said County, the Board of Supervisors and the several committees thereof and the several County officers, which might be required, except such services as under the law could be rendered only by the States Attorney; that the finance committee had reported to the said Board that the said Inghram had earned $450 for the months of September, October and November, 1919, and that the said Board had authorized the issuance of a voucher therefor and directed the County Treasurer to countersign said voucher and to pay the same to the said Inghram and in case he should refuse to do so to have legal proceedings begun to compell him to do so.

It is further alleged in said supplemental bill that the repeal of Rule 18 and the making of the illegal verbal contract by the said finance committee with the said Inghram was a mere subterfuge to evade the law.

It is further alleged in said supplemental bill that the said Inghram is not and has not been the States Attorney of Adams County or his assistant, and that he has never been appointed by

the Court to act as such, and that the States Attorney had not requested the said Inghram to assist him in any manner in his duties nor has be asked the County of Adams to employ an assistant for him, and that the said States Attorney has never

failed, neglected or refused to efficiently discharge all duties required of him in his said office and is able and willing to efficiently perform the same; and that it is the duty of the States Attorney to render all the services which the said Inghram had been employed to render.

It is further alleged in the said supplemental bill that the said Board of Supervisors had already made an appropriation of $1800 to pay the said Inghram the pretended salary stipulated in said illegal contract to be paid to him as an Attorney for said County. The prayer of this supplemental bill is for an injunction restraining the carrying out of the oral contract that was entered into by the finance committee with the said Inghram and ratified by the Board of Supervisors or the payment of the said sum of $150 or any part thereof, which by the said agreement was to be paid to the said Inghram, and for general relief.

To this supplemental bill an answer was filed by the County of Adams, and Frank A. Jasper as Treasurer of said County, by J. Leroy Adair, States Attorney, the substance of which is a denial that the contract in question and the acts that it is alleged preceded the making of it are illegal. None of the material facts themselves are denied. From the facts alleged and admitted in the answers filed by Appellant to the original bill as amended and to the supplemental bill in connection with what competent proof there is in the record, it is established as facts than an oral contract has been entered into by the finance committee of the Board of Supervisors of Adams County with the knowledge, consent and approval of the said Board and at its suggestion for the employment of the said John T. Inghram for the doing of the same work that this Court held in this same case when it was here before, it was the duty of the States Attorney to perform. **Abbot v. Adams County,** 214 Ill. App. 201. The only real difference between the facts alleged

in the original bill as amended and those now before this Court by pleadings and proof is that there is now an **oral** contract for the employment of the said Inghram while before it was in writing. What we held when the case was here before as to the rights of the County of Adams to contract for the employment and payment of others to do the work the law makes it the duty of the States Attorney to perform, and for which a very sub-

stantial compensation is provided and paid to him, we adhere to now. We are satisfied that the action of the Board of Supervisors of Adams County in abolishing Rule 18 of that Board under which the contract set out in the original bill as amended was executed, and the making of the oral contract set out in the supplemental bill was merely a subterfuge, a shift and device resorted to in the hope of confusing the real issue. However that may be, the new contract as we view it is at least as viscious as the first.

The Circuit Court by its decree restrained the performance of both the contract set out in the original bill as amended and the contract set out in the supplemental bill, and the county has appealed.

The decree of the Circuit Court is in accord with the previous mandate of this Court and with the views above expressed and is affirmed.

Decree Affirmed.

General No. 7253 Agenda No. 39

October Term, 1920

Confer Medical Company, Appellant

vs.

D. J. Holterman, et al, Appellees

223 I.A. 651

Appeal from the Circuit court of Champaign County.

GRAVES P. J.

This is a suit in assumpsit against the guarantors of the honest and faithful performance of one B. W. Clark of a certain contract made by him with appellant whereby appellant was to furnish to said Clark certain medicines, extracts, etc., for sale by him to his customers. The declaration consisted of two counts. In the first count it was alleged in substance that Clark had entered into a contract with appellant for the purchase of goods on credit to be sold by him to consumers; that the same were to be paid for in installments of one-half of the amount collected as the goods were sold and the balance within six months after the termination of the contract; that the defendants had guaranteed the honest and faithful performance by Clark of this contract; that appellant had shipped to Clark goods under this contract; that there was due from Clark to appellant for goods so sold $1672.29, and that more than six months had elapsed since the

termination of that contract. This count contains a copy of the contract.

The second count contains an additional averment that appellant had rendered to the said Clark a statement showing a balance due of $2005.82 and that the said Clark had signed a written statement acknowledging that amount to be due. The plea was the general issue with notice of special defenses which was in effect that Clark had remitted to appellant in cash an amount equal to one-half of all the receipts from the business and that he had done so each week while the contract was in force until his account was balanced; that in so doing he had within six months after the termination of said contract paid appellant at current wholesale prices for all goods delivered by it to him; that Clark received the goods in question by consignment as the agent of appellant and not as purchaser of such goods; that the acknowledegment of Clark is not binding on his sureties these

appellees; that the contract required of Clark to pay one-half of the moneys collected from the sale of the goods in question and that appellant is estopped from claiming more than that amount, and from

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claiming that Clark was a purchaser of the goods and not merely an agent of appellant for the sale of them. The contract in question is as follows:

"Whereas, Mr. B. W. Clark of Sadorus, Illinois, desired to purchase of the S. D. Confer Medical Company of Orangeville, Illinois, on credit and at wholesale prices to sell again to consumers, Medicines, Extracts, Spices, Soaps, Stock Tonic and other goods manufactured and put up by it, paying his account for such goods in installments as hereafter provided.

Therefore, he hereby agrees to sell no other goods than those sold to him by said company, to sell all such goods at regular retail prices to be indicated by it, and to have no other business or employment.

He further agrees to pay said Company for all goods purchased under this contract the current wholesale prices of such goods by remitting in cash each week to said Company an amount equal to one-half the receipts from his business until his account is balanced and for that purpose as evidence of good faith he shall submit to said Company weekly reports of his business; provided however, if he pays his account in full on or before the tenth day of each month he is to be allowed a discount of three per cent from current wholesale prices. Upon termination of his contract from any cause or by either party he further agrees to settle in cash within six months the balance due said Company on account.

Unless prevented by strikes, fires, accidents, or causes beyond its control, said Company agrees to fill and deliver on board cars at Orangeville, Illinois, his reasonable orders, provided his account is in satisfactory condition, and to charge all goods shipped him under this contract to his account at current wholesale prices; also to notify him promptly of any change in wholesale or retail prices.

This contract is subject to acceptance at the home office of said Company and is to continue in force only so long as his account and the amount of his purchases are satisfactory to said Company, provided, however, that said B. W. Clark, or his guarantors, may be released from this contract at any time by paying in cash the balance due said Company on account.

Dated Orangeville, Illinois, November 28th, 1911.

The S. D. Confer Medical Company.

B. W. Clark.

For and in consideration of the Sum of One Dollar to us in hand paid, and the receipt therefor is hereby acknowledged and in consideration of The A. D. Confer Medical Company extending credit to

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him the undersigned guarantee jointly and severally, the honest and faithful performance of said contract by him, waiving acceptance and all notice, and agree that any extension of time or change of territory shall not release us from liability hereon.

(Responsible men sign in ink.)

(Signed)	D. J. Holterman	Occupation Farmer	Sadoris, Ill.
"	E. Styan	"	Sadoris, Ill.
"	John H. Rock	"	Pesotum, Ill.
"	Guy Cook	"	Ivesdale, Ill.

(Appearing on the back thereof is the following:)
These blanks are for office use only
Contract No. 1
Name B. W. Clark
Received Dec. 13, 1911
Accepted———————
Price List and Copy Mailed ———————
Territory
State Illinois
County: Piatt County, Ill. & four townships in Macon County, Friend Creek, Oakle, Long & Whitmore.
Notice: This contract will not go into force until salesman receives "Agent's" Confidential Price List" and instructs Company to make first shipment of goods. If salesman should not find prices satisfactory on being submitted to him, he can return them to Company and contract will be cancelled."

On these issues the case went to trial before a jury Appellant proved the execution of the contract and introduced it in evidence and it was then stipulated between the parties that there had been shipped by appellant to Clark during the continuance of the contract all told goods to the amount of $7190.13 at current wholesale prices, and that Clark had paid appellant in cash and credits $5515.87 and that such amount was equal to one-half of the amount received by Clark from the sale of such goods, and that the amount so received lacked $1672.23 of equalling the current wholesale price of the goods

shipped. Appellant then rested its case and appellee moved for a peremptory instruction directing the jury to find the issues for the defendant. This motion was denied. Appellees then offered considerable evidence for the avowed purpose of showing the construction placed upon this contract by the parties, but particularly by appellant, after the contract was signed. This evidence was objected to by appellant and was admitted subject to objection and was heard by the court out of the presence and hearing of the jury. After listening to this evidence the court announced that the motion of appellees to peremptorily instruct the jury to find the issues for the defendants would be allowed; the jury returned into court but no further evidence was heard by them and the court gave the peremptory instruction asked for. A verdict for the defendants was duly returned and a judgment in due time followed in favor of defendants and against plaintiff in bar of its action and for costs.

Where the terms of a written contract are uncertain and ambiguous and the language employed leaves the meaning of the contract in doubt, parole evidence

may be received to ex-

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plain it; but not so if the intention of the parties can be gathered from the writing itself. **(Rector v. Hartford Deposit Co.,** 190 Ill. 384; **Walton v. Follansbee** 165 Ill. 486; **Kimball v. Cunster,** 73 Ill. 393; **Strauss v. Cohen Bros. Co.,** 169 Ill. App. 341; **Williams v. Press Pub. Co.** 126 Ill. App. 126.)

In the case at bar the contract itself is not ambiguous. It is plainly a contract for the purchase of the commodities mentioned, at current wholesale prices, for resale to consumers. B. W. Clark, the purchase in the contract, to have no other business or employment and sell no other goods than the goods purchased from appellant, and to pay for the same by turning over to appellant a sum equal to one-half of the receipts from the business of selling such goods until his account is balanced and upon the termination of his contract from any cause by either party he agrees to pay the balance of his account due appellant, if any there exists, within six months from the termination of the said contract. Some minor matters are mentioned in the contract, but they are as clearly expressed as those mentioned. A wide discrepancy does not exist between the

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contract

sued on and what was said and done by the contracting parties in and about the attempted performance of the same. The contract was clearly one for the purchase of goods to be sold. They conducted the business done under it in a way to be strongly suggestive of an agency on the part of Clark to sell the goods of appellant.

There being no ambiguity in the terms of the contract sued on it was error for the court to hear evidence tending to show the construction placed upon it by the parties. This was not an action to reform a contract, but to enforce it. ~~If it had been a suit to reform the contract, the most if not all of the evidence taken by the court out of the presence of the jury, would not only have been admissable but very persuasive. If the evidence was offered and admitted, as has been suggested by some of the contentions made, to show an estoppel, and if that question was then properly before the court, then it should have been submitted to the jury. In any view that can be taken of this case,~~ It was error for the court to admit and consider the evidence offer-

ed by appelle on a motion to peremptory instruct the jury.

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It was also error to give the peremptory instruction directing the jury to find the issues for the defendant, for there was evidence in the record of the contract and a stipulation of the parties showing the delivery of the goods and admission of existing indebtedness. In other words, there was evidence in the record from which, standing alone, the jury might without doing violence in the eyes of the law have found a verdict for appellant. **Libby, McNeil & Libby v. Cook,** 221Ill. 206.

The judgment of the circuit court is reversed and the cause remanded to that court.

Reversed and Remanded.

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General No. 7258 Agenda No. 15

October Term, 1920

John Chavis, Appellee

vs.

Danville Street Railway and Light Company, a corporation, Appellant,

Appeal from the circuit court of Vermilion County.

GRAVES P. J.

A service truck belonging to appellee and a street car belonging to appellant met on the right of way used by appellant in the streets of Danville and the truck was injured. This suit was begun to recover for the damages done the truck. A verdict for appellee and assessing his damages at $563 was returned by the jury. Appellee filed a remittitur of $180 and judgment was rendered in favor of appellee and against appellant for $383.

It is first contended that the court erred in denying the motion of appellant for a continuance. The basis of this motion was the absence of a material witness. The affidavit in support of the motion for a continuance was insufficient in that it failed to state that the testimony the absent witness would give would be true. It is further insufficient in failing to show facts to support the conclusion that if the conitn-

uance should be granted the testimony of the absent witness could be produced at the time said cause should again be reached for trial. It further fails to show that the same facts appellant desired to prove by the said absent witness were not also known to many other witnesses by whom the same could be proven equally well as by the said absent witness. The motion for a continuance was properly denied. **MacKicham v. McBean,** 45 Ill. 228; **Eames v. Hennessey,** 22 Ill. 629; **Cook v. Northwood,** 106 Ill. 558.

An ordinance of the City of Danville granting to the Danville & Eastern Illinois Railway Company a franchise to construct, maintain and operate a street railway in certain streets in the City of Danville including the part of the city where the accident involved in this case occured, was admitted in evidence over the objection by appellant. This appellant contends was error.

The record shows that appellant is the lessee of the Danville & Eastern Illinois Railway Company and was at the time of the collision in the exclusive operation of the road constructed under the franchise granted by the ordinance in question. The ordinance in question requires, as one of the conditions upon which the franchise could be accepted, and the rights thereby

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granted could be enjoyed, that the tracks should be so laid as not to project, be more than one half inch above the level of the street "so that carriages and other vehicles can easily and freely cross said tracks at any and all points." The second count charges that the rails on said tracks at the time and place of the collusion in question were so laid as to project five inches above the surface of the street and that as a result of the condition of the track and the negligent manner in which appellant's servants operated its cars the injury was sustained. The proof shows that the rails in question did project above the surface of the street several inches and that the driver of the truck in question attempted to turn out of the right of way when the car approached and was unable to get the truck over the rails that so improperly projected above the surface of the street.

The lessee of a railroad takes it subject to the performance of all lawful requirements of the charter or franchise under which the same was constructed and is operated and which make for the safety of the public. **Pennsylvania Co. v. Ellett,** 132 Ill. 654; **Chicago and Erie Railroad Co. v. Meech,** 163 Ill.

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305; **People v. St. L. A. & T. H. R. R. Co.** 176 Ill. 512; **Suburban R. R. C. v. Balkwill, Admix,** 195 Ill. 535. It was proper in this case that the jury should know not only what the franchise ordinance required in that respect, but whether such requirements had been complied with and if not whether the failure to comply with the same was the proximate cause of the collusion. For that purpose the ordinance was properly admitted. The fact that such ordinance may show other requirements which have no connection with the collision does not render its admission in evidence erroneous. Neither is it important in this case to determine whether a lessee of a railroad is by reason of its relation as such under any obligation to perform

the contractural obligation of its lessor. That has no relation to the cause of the collision in question.

On cross examination the boy who was running the truck was asked whether he had a Chauffeur's license at the time. Objection to that question was sustained.

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It was not proper cross examination of anything the boy had testified to, and the objection was properly sustained.

Proof was admitted over objections of appellant tending to show what the use of the truck was worth during the time it was being repaired. This was erroneous because the only loss shown to have been sustained by reason of the truck being out of commission was sustained by the firm of Chavis Brothers, while this suit is begun by one of the partners only who was individually the owner of the truck. The proof conclusively showed that the work performed including $15 for bringing the car from the place of the collision to the garage together with the materials furnished in the repair of the truck amounted to $383. On that state of the proof the jury assessed appellee's damages at $563. Appellee then filed a remittitur of $180 leaving $363, the exact amount of the cost of repairing the truck including materials furnished and work performed. Judgment was entered for that amount only. It is manifest that any harm done by the admission of the evidence in question was cured by

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the remittitur. It is true that where there is anything tending to show that the verdict of a jury was founded on the passion or prejudice of the jury a remittitur will not sanctify it; but where an excessive verdict is returned as a result of miscalculation or as in this case because of some improper element of damage which the jury have been led to consider by the admission of improper evidence, it usually will do so.

Several other complaints are made by appellant as to the rulings of the court on the admission and exclusion of evidence and in giving and refusing instructions, but they are without merit and a detailed discussion of each of them would unduly extend this opinion.

It is next contended that the evidence does not show negligence on the part of appellant or lack of contributory negligence on the part of appellee. Those questions are for the jury and it is not the part of an appellate

court to substitute its judgment for that of a jury on questions of fact when there is evidence strongly tending to support the verdict. It is only when the verdict is manifestly contrary to the evidence that an appellate court can properly reverse a judgment for

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that reason. In this case a careful study of the evidence, instead of showing that the verdict is manifestly wrong forces us to the conclusion that it is right and that the judgment should stand.

The peremptory instructions tendered by appellant were properly refused. There was evidence in this record which standing alone fairly tended to support the claims of appellee and from which the jury without doing violence in the eyes of the law could return a verdict in favor of appellee. Under that state of facts it would have been error to give the peremptory instructions asked. **Libby, McNeil & Libby v. Cook,** 222 Ill. 206;

Finding no reversible error in this record, the judgment of the circuit court is affirmed.

Judgment affirmed.

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certiorari denied

General No. 7261 Agenda No. 45

October Term, 1920

Charleston State Bank, Appellee

vs.

Isaac B. Craig, Appellant

Appeal from the circuit court of Coles County.

GRAVES P. J.

223 I.A. 652

This is a bill in equity for an accounting brought by appellee against appellant and arises out of a series of transactions commencing with a contract entered into between the parties in 1906, whereby appellee was to advance to appellant and did advance to him $4000 with which to purchase several hundred acres of land in the State of Texas, which he was to sell and divide the profits in a stipulated manner. Appellant purchased the land and sold it out in two seperate tracts. One of these tracts containing 200 acres he deeded on November 12, 1906, to one Geo. W. Hogue for the expressed consideration of $5175. The deed recites that $3175 of this was paid in cash and that $2000 of it was evidenced by a certain promissory judgment note payable to appellant due in one year drawing seven per cent interest and secured by a trust deed. Appellant has consistently contended since long before this suit was commenced that he sold this 200 acre tract to one John Hall for

the consideration of $2000 and that before the deed was made to him he, Hall, resold it to George W. Hogue and requested appellant to convey it to Hogue for the consideration named in the deed, which he did; that the $3175 named in the deed as part of the consideration in hand paid in cash was, in fact, two promissory notes, one for $1500 and the other for $1675, signed by one W. H. Galbraith and on their face payable to Mrs. Geo. W. Hogue, wife of the grantee in the deed, which said notes appellant turned over to John Hall to whom he had sold the land and to whom they belonged, and that all he ever in any way received for that 200 acre tract was the $2000 for which he contracted to sell it to John Hall; that the officers of appellee bank knew all about the transaction at the time; that the balance of the land was sold in January, 1908, and settlement thereupon made with appellee.

Appellee concedes that settlement was made according to the stipulation in the contract first above referred to as to all the proceeds of the land transaction except the $3175 mentioned in the Hogue deed as the cash consideration. The Master in Chancery to whom this cause was referred to state

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an account between these parties charging this $3175 to appellant and found and reported that after so doing there was due from him to appellee $1163.50. Exceptions of appellant to this report were overruled by the court and he was decreed to pay appellee that amount of money.

In order to warrant that decree it must have the support of a preponderance of the evidence in this record. **Hyde v. Heath**, 75 Ill. 381; **City Bank of Ottawa v. Dodgeon** 65 Ill. 11-15.

Appellant when called as a witness by appellee and when he subsequently took the stand in his own behalf, testified to the contentions made by him as above recited. If his testimony is taken as true, and it must be unless there is sufficient evidence in the record to the contrary to overcome it, then all he ever received for the Hogue land was $2000, the Galbraith notes while they passed through his hands were never his and he never made any claim to them, but turned them over to John Hall with whom he dealt in the transaction. In this he is corroborated by the witness Abel who says he saw these notes in Hall's possession. The fact that Hall was able to and did sell

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the land for a very considerable sum in advance of what he agreed to pay Craig for it, in no way impeaches the transaction between Craig and Hall, particularly when at the bankruptcy sale of Hogue this same land sold for but $25 more than Craig claims to have received for it, which strongly tends to show that the price Craig sold it for was its fair cash market value. It may well be, as has been suggested, that the deal between Hall and Hogue was irregular in some way and that the excessive consideration received by Hall from Hogue was in futherance of some scheme to cover some of Hogue's assets in contemplation of bankruptcy proceedings, but that in no way tends to show that Craig received more than $2000 for the premises.

Appellee states several times in his argument that

the deed recites that Craig received the $3175 Galbraith notes. There is no such recital in the deed. It is recited that part of the consideration for the deed was $3175 cash in hand paid, which is concededly not true. The testimony of appellant shows the $3175 was represented by the Galbraith notes; that they were delivered by Hogue to Hall through appellant as a conduit.

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There is no positive and direct evidence to in any way contradict the testimony of appellant. The nearest approach to it is the testimony of Hogue, the grantee in the Craig deed. He says he remembers the fact of purchasing the land of Craig; that he paid about $26 per acre for it and that he gave Craig the notes in question in part payment. He does not say with whom he made the contract to buy the land or that Craig ever collected the notes or that the notes were ever paid by anybody. The statement that he remembered purchasing the land of Craig could at the most be no more than a conclusion from some fact not related and cannot be regarded as a contradication of anything appellant testified to. Even if these notes were delivered to appellant as his property there is no proof that they were ever piad to appellant or to any one else, and by his contract with appellee, appellant was bound only to account for the money he received for the lands. The circumstance that appellee stopped receiving deposits in 1914 and went into voluntary liquidation and made no attempt to collect this claim until this suit was begun is very suggestive that appellant's testimony is correct when he says he settled this whole matter in

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1910. The preponderance of the evidence in this record instead of establishing the findings of the decree are manifestly contrary to it.

Appellant insists that the evidence warrants a decree in his favor against appellee for $97.73. In view of the testimony of appellant that this whole matter was settled in 1910 a decree in his favor for $97.73 would be as contrary to the evidence as the one appealed from.

The decree of the circuit court is reversed and the cause is remanded to that court with directions to enter a decree that there is nothing due either from appellant to appellee or from appellee to appellant and directing that complainant pay the costs.

Reversed and remanded with directions.

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General No. 7262 Agenda No. 4

October Term, 1920.

Ernest L. Minnis, by his next friend, Appellant

vs.

Viola M. Mathews, and L. L. Mathews, Appellee

Appeal from the Circuit Court of Christian County.

GRAVES P. J.

223 I.A. 652

Eddie E. Minnis, dies testate on April 2, 1909, leaving Viola M. Minnis (now Mathews) his widow, and Ernest L. Minnis is His only child. At the time of his death, Eddie E. Minnis was seized in fee simple of a farm of one hundred and fifty-three and one-half acres, on which he was residing; also an undivided one-half interest in another tract of land containing forty-five acres. By his will Eddie E. Minnis devised all of said real estate to his son Ernest in fee subject to a life estate in an undivided one-half part thereof which he gave to his widow the mother of his said son. After his death his widow and son continued to live on the home farm. She was duly appointed the guardian of their said son on April 16, 1909, and on May 26, 1915, she was married to one L. L. Mathews, one of the appellees in this case. The new husband took up his residence at the Minnis home farm and has since that time conducted the farming operations on the lands above mentioned. Ernest L. Minnis, the son, while yet a minor began this suit in Chancery by Will Minnis, his next friend, praying for partition of the premises in question between him and all others having an interest therein and for an accounting by the said L. L. Mathews of the rents and profits realized from the premises of appellant while the same was occupied by the said Mathews, and for an accounting by the said Viola M. Mathews, his mother and guardian for the rents and profits of his interest in the said premises received by her and for general relief. Issues were found on this bill and the case was referred to the

Master in Chancery

of that court who took the proof and reported the same without any conclusions thereon as directed by the order of reference in this cause whereupoon the court found what the interests of the several owners of the land were and decreed partition thereof according to the interests so found, and also found that appellee, L. L.

Mathews, had paid to appellant all that was coming to him from the use of the said premises and that there was nothing for him to account for and dismissed the said bill as to the said L. L. Mathews and refused to require an accounting by appellee Viola M. Mathews, his legal guardian. The basis of the decree as to appellee L. L. Mathews was the finding of fact that he had occupied the premises of appellant all the time under a lease made by Viola Mathews, the guardian; that it was for a reasonable rental and that he had paid all that he had agreed to pay. From this decree the son Ernest L. Minnis has appealed.

That L. L. Mathews occupied the premises during all the time he is charged to have done so is undisputed. The character of his occupancy is shown by the testimony of Mathews himself. He testified that he occupied it as tenant under a contract of leasing made between him and the guardian of the said Ernest L. Minnis; that he was to pay as rental $4.00 per acre and keep the sheep and horses of appellant, except for the last two years when he was to pay $5.00 an acre for part of it and share rent for part of it and was to keep and feed the horses and sheep belonging to appellant. In this he is not contradicted by any one and is corroborated by his wife the guardian of the boy, who testified that her husband told her the cash rent proposed by him was as he thought about right in view of the expense of keeping and feeding the stock of appellant and that he settled with her from year to year on that basis. There is no averment or proof of any fraud or conspiracy to overreach appellant in this leasing. And while there is some proof that part of the time during which Mathews occupied these premises the same

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could have been rented for a very considerable more than $4.00 or over $5.00 per acre when the expense of the care and keep of the stock is taken into consideration at a time when the grain and hay that stock consumed was like rental, abnormally high, we think the compensation for the land so paid by Mathews was fair and reasonable, at least we can not say that the finding of the circuit court that it was so fair and reasonable is manifestly contrary to the weght of the evidence.

Finding no reversible error in the record, the decree of the circuit court is affirmed.

Decree affirmed.

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No. 7265. Agenda No. 4

April Term A. D. 1921

Hulda A. Walton, Appellee,

vs.

Bloomington, Decatur and Champaign R. R. Co.
Appellant.

Appeal from the Circuit Court of Macon County.

GRAVES P. J.

This is an appeal by the Bloomington, Decatur and Champaign Railroad Company from a judgment against it of $1500, in favor of Appellee in a suit for damages for personal injuries, as well as injuries to her automobile, resulting from a collision at the intersection of the public highway and the right of way of Appellant between an electric driven car of Appellant and the automobile in which Appellee and her husband was riding and which he was then operating.

There are five counts in the declaration. The first count charges Appellant with general negligence in the operation of its car. The second count charges Appellant with negligently operating its car at a high and dangerous rate of speed. The third count charges the failure of Appellant to give any warning by bell, whistle, or otherwise, of the approach of its car. The fourth charges that Appellant allowed weeds and vegetation to grow upon its right of way so as to obstruct the view of persons approaching the crossing, and the fifth charges that Appellant, well knowing that the view of persons approaching the crossing in question on the highway was obstructed by vegetation and a line of poles there situated, negligently managed and controlled its car there and struck Appellee.

The only facts that are undisputed are that a collision occurred and that both Appellee and the car in which she was riding were more or less injured. The evidence is strongly conflicting as to whether Appellant was negligent in any of the ways charged in the declaration: as to whether Appellee was guilty of contributory negligence: as to whether the husband

was guilty of negligence that should be imputed to Appellee, and on several less important questions. The evidence as to the ownership of the automobile, the extent of the injuries

of Appellee as well as to the amount of damage done the automobile, also as to the existence and extent of the claimed obstructions to the view at and near the crossing where the collision occurred is far from satisfactory. In that state of the record it was of the greatest importance that the jury should be fully and accurately instructed.

The first instruction given at the instance of Appellee was intended to state the rule as to what the proof must show to constitute negligence in the rate of speed the car in question was being operated at and just before the collision, but it is so involved and confused as to be likely to mislead the jury. It practically tells the jury that "it is negligence to run a car at a rate of speed that constitutes negligence." This instruction is in part as follows:

****"It will be sufficient so far as the allegation of speed in said counts is concerned, if the evidence shows that said car is shown to have run at such a rate of speed as it approached and passed over said crossing as constituted negligence as alleged in said counts."**** There is nothing in this instruction or in fact in the series of instructions that defines when or what rate of speed in the operation of a car constitutes negligence, and it is in other respects muddled and erroneous.

The second instruction given at the instance of Appellee undertakes to announce the rule of law that the exercise of due care by a person confronted by sudden peril does not require the exercise of such calm deliberation and judgment as might be required of one having more time to consider the situation, but it entirely ignores the question of how such person came to be in the position of sudden peril. It is erroneous for that reason. **North Chicago St. R. R. Co. v.**

Cossar 203 Ill. 613; **Elders v. Peoria St. Ry. Co.** 200 Ill. App. 487; **Healey v. Chicago City Ry. Co.** 167 Ill. App. 524.

Appellees eighth given instruction is on the question of the measure of damages and is erroneous as to the damages to the automobile which the jury are told in substance was the difference between its fair cash market value before and after the collision. The true measure of damages on that branch of the case is the cost of repairs and the damages sustained by reason of the necessary loss of its use while being repaired. **Coyne v. C.**

General No. 7269. Agenda No. 51.

October Term, 1920

Gilman & Company, Appellee,

vs.

Alec Gudger, Appellant, 223 I.A. 652

Appeal from the Circuit Court of Montgomery County.

GRAVES P. J.

Appellee obtained a judgment against Appellant for $2768. for damages for failure to deliver a lot of hides purchased by Appellee of Appellant. Appellant has argued several alleged errors for the reversal of this judgment. First it is contended the Court erred in admitting the testimony of the witness Pollak as to the market value of hides in Litchfield and Chicago. The objection made at the trial to his testimony was that the published quotations are the best evidence. The evidence shows that he was familiar with the business of buying and selling hides: that he was in that business: that he had known of sales of similar hides: that he knew what the published quotations were and that the market prices of hides in Chicago, Litchfield, St. Louis, Mo., and Ft. Wayne, Ind. were the same. The published quotations were only one of the sources of the information the witness had as to the value of hides. The objection was properly overruled. He was a qualified witness on the subject and his testimony was not secondary or hearsay evidence. **C. C. C. & St. L. Ry. Co. v. Patton** 203 Ill. 376-378, **C. & N. W. Ry. Co. v. Stock Farm** 194 Ill. 9, **Jackson v. N. C. & H. R. R. R. Co.** 167 Ill. App. 461-468. It is next argued that there was no contract because there was not a meeting of minds as to its terms. The preliminary negotiations concerning this contract was made over the telephone but what was then said was excluded by the Court on objection by Appellant. The real contract was made by letter. Each party writing a letter to the other party confirming the contract made over the phone and reciting the terms of it in equivalent if not in identical language. There is nothing in the contention that there was no contract. It is lastly argued that the Court

erred in sustaining objections to telephone conversations between Appellant and someone at the office of Appellee. The evidence sought by this excluded conversation was that the prices

named were f. o. b. on cars at Litchfield and Chicago. When the witness Pollak was on the stand, Appellee undertook to prove a conversation between him, then representing Appellee and Appellant, and on objection of Appellant it was excluded. The ruling in both instances was erroneous under the authority of **Godair v. Ham. Nat. Bank** 225 Ill. 572, but the Court was first led into error by Appellant and he cannot complain that the same erroneous ruling was made against him. **McKinzie v. Lane** 235 Ill. 544, **Oliver v. Oliver** 179 Ill. 9, **Smith v. Kimball** 128 Ill. 583, **Bernstein v. C. I. & L. Ry. Co.** 147 Ill. App. 447.

Other errors than those above referred to were assigned, but they are the only ones argued in this Court and it is a familiar rule that errors not argued will be regarded as waived. **McElroy v. Catholic Press Co.** 254 Ill. 290-292, **Brown v. Burley** 168 Ill. App. 114-118.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

General No. 7272 Aegnda No. 54

October Term, 1920

Edward Thompson Publishing Co., Appellee

vs.

O. A. Smith, Appellant

Appeal from the Circuit Court of Tazewell County

GRAVES P. J.

223 I.A. 653

Appellee began this case to recover a balance claimed to be due from Appellant upon a contract to sell to Appellant a set of law books known as the American and English Annotated Cases. In the making of this contract Appellee was represented by a person who signed himself as James Thomas, Agent. It was this man Thomas who prepared the contract. He pretended to make the same in duplicate but did not in fact do so. The copy he left with Appellant contained the words "This order is subject to approval of books on delivery of digest" while the copy forwarded to Appellee contained the words "This order is subject to your approval." For a very similar contract made with Appellee, the Edward Thompson Publishing Co., by this same agent Thomas for the sale of a like set of books and in which a very similar discrepancy appears between the original contract and its purported duplicate, attention is called to the case of **Edward Thompson Co. v. Hunt,** 218 Ill. App. 616. In the case at bar Appellee secured a judgment.

Appellant has perfected his appeal and has filed in this Court his transcript of the record and his abstract of the same together with his brief and argument, in compliance with the law and the rules of this Court. Appellee on its part ahs ignored the appeal entirely, and has filed no brief or argument in support of its judgment. The rules of this Court provide that "If the defendant in error or Appellee shall fail to file his brief in compliance with these rules, the judgment or decree will be reversed **pro forma,** unless the Court on examination of the record shall deem it proper to decide the case on its merits." There seems to be no reason why this Court should feel called upon to hunt up a defense for Appellee to save its judgment for it, if it has not sufficient interest in it to file a brief and argument in

compliance with the rules of this Court.

The judgment of the Circuit Court is reversed **pro forma** because Appellee has filed no brief to assist the Court in sustaining it, and the cause is remanded to that Court for a retrial.

Reversed and Remanded.

General No. 7283 Agenda No. 63

October Term, 1920

Joe Bonicotto, Appellee,

vs.

Joseph H. Nicolai, Appellant.

Appeal from the Circuit Court of Sangamon County.

GRAVES P. J.

In December, 1918, Appellant received from Appellee $500. and has never returned it. Appellee claims it was a loan to Appellant which had never been repaid. Appellant claims it was Appellees share or investment in a proposed corporation to be organized by Appellant and Appellee and some third person yet to be found for the issuance of funeral benefit insurance. This suit was begun by Appellee to recover the $500. in question together with interest thereon. The case was tried by a jury. By its verdict the issues were found for Appellee and his damages were assessed at $531.25 and judgment was entered on the verdict.

Three claimed errors are argued by Appellant. That the verdict is not supported by the weight of the evidence: that the Court gave two improper instructions at the instance of Appellee and refused two proper instructions requested by Appellant.

The only witnesses in the case were the parties themselves, and the testimony of each was diametrically opposed to that of the other. It was the province of the jury to weigh the evidence and pass upon the credibility of the witnesses. In the performance of that duty the jury found the issues for Appellee and after a careful examination of the evidence, we are not prepared to say the verdict is not amply justified by it. It is not the province of the Court to interpose its judgment for that of the jury on questions of fact unless the verdict is manifestly wrong, which it is not in this case.

The instructions given to which objections are made are clearly right, and those of Appellants that were refused are confused, misleading and not warranted by the evidence and were properly refused.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

General No. 7290 Agenda No. 7

April Term A. D. 1921

Jasper Shadid for use of John P. Snigg,
Defendant in Error

vs.

Homer N. Shonkwiler, Plaintiff in Error

Error to Circuit Court of Sangamon County

223 I.A. 653

GRAVES, P. J.

Jasper Shadid, by the name of Joseph Shadid, obtained a judgment in a Justice Court of Sangamon County against one Sam A. Gazelle for $200 and costs. Gazelle appealed from that judgment to the Circuit Court of Sangamon County. His appeal bond was signed by Homer N. Shonkwiler and was in the sum of $500. On a trial of that cause in the Circuit Court Shadid was again successful and obtained a judgment against Gazelle for $200 and costs. That judgment was assigned by Shadid to John P. Snigg who had been his Attorney in the litigation, the consideration being a balance due for fees which appears from the evidence in this record to be $125. That judgment so assigned was never paid and this suit was begun in the name of Shadid for the use of Snigg against Plaintiff in Error on the appeal bond, which he had signed with Gazelle. The case was tried by the Court, jury being waived. The Court found the issues for the Plaintiff and entered judgment in his favor for $500 debt and $75 damages to be satisfied on payment of the damages and costs. Why the damages shoud not have been the full amount of the judgment against Gazelle and interest thereon does not appear. Shonkwiler has sued out this writ of error.

The first point made by Plaintiff in Error is that the appeal bond signed by him was made in a suit in which **Joseph** Shadid was Plaintiff; that the judgment assigned to Snigg was one in which **Jasper** Shadid was Plaintiff and that there is no proof that Joseph Shadid ever did obtain a judgment in the

Circuit Court in the case in which the appeal bond sued on was given and that therefore no breach of the appeal bond is shown. In his statement of facts Plaintiff in Error says:

"In August, 1919, one Joseph Shadid sued one Sam A. Gazelle before James Reilly, a justice of the peace, for the sum of two hundred dollars and recovered a

judgment for that sum. H. N. Shonkwiler signed an appeal bond, appealing said cause to the Circuit Court, and when the cause got into the Circuit Court the proceedings thereafter ran in the name of Jasper Shadid against Sam A. Gazelle. Jasper Shadid executed a power of attorney to collect that judgment."

During the trial, both John P. Snigg and Sam A. Gazelle, the principal in the bond sued on, testified no objection being made to it, that Joseph Shadid and Jasper Shadid were one and the same person. This part of the evidence was not abstracted. It follows that whether the case in the Justice Court was in the same name as Plaintiff as the case in the Circuit Court on appeal, and whether the assignment of the judgment in the Circuit Court is signed by Joseph or Jasper Shadid, the case is the same in both courts and the judgments in both courts are in the same case and the Plaintiff in both courts is the same person.

Plaintiff in Error argues that there is no proof that Joseph Shadid has not been paid his full judgment. In that contention he is in error for the abstract prepared by him shows that the Gazelle, the judgment creditor himself, testified that the judgment had not been paid.

An examination of the instrument called by Plaintiff in Error a power of attorney to collect the judgment, and by Defendant in Error an assignment of the judgment discloses the fact that it is both an assignment of the judgment and a power of attorney to collect the same in the name of the judgment creditor. The assignment of a judgment rendered in the Circuit Court on appeal from a justice of the peace carries with it the right to sue on the appeal bond. **Ullman vs. Kline** 87 Ill. 268; **Knight vs. Griffey,** 161 Ill. 85; **Same Case** 57 Ill. App. 583.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

No. 7296. Agenda No. 13.

April Term, A. D. 1921

People of the State of Illinois, Appellee,

vs.

Arthur Anderson and F. Albin Anderson,

Appellants.

Appeal from the Circuit Court of Ford County.

GRAVES, P. J.

Appellant was indicted at the April term, 1920 of the Ford County Circuit Court and on being arrested during that term he entered into a recognizance in the sum of $800, in the usual form for his appearance to answer to the indictment. Appellant, F. Albin Anderson, was his surety. The cause was then continued until the next term of the Circuit Court of Ford County which convened on August 17, 1920. At that term Appellant, Arthur Anderson, failing to appear, a judgment of forfeiture of the recognizance was entered and a **Scire Facias** was ordered, returnable to the first day of the December term, 1920, and was issued. The return thereon shows that it was served on Appellant, F. Albin Anderson, on September 22, 1920 and that Appellant, Arthur Anderson, was not found although the writ remained in the hands of the sheriff until December 4, 1920. On December 7, 1920, the same being the first day of the December term of that year, Appellant, Arthur Anderson, was again taken into custody under a criminal capias. Thereupon he entered his motion supported by affidavits to set aside the forfeiture of his recognizance; this motion was denied. Appellants then filed six pleas to the **Scire facias.**

A demurrer to all of these pleas except the plea of **Nul tiel record** was sustained, issue was joined on that plea, and a trial by inspection of the record was awarded and had by the Court without a jury. The finding of the Court on the issue found was for the People and execution was awarded against Appellants according to the form and effects of

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the recognizance, in the sum of $800.

The first reason urged by Appellants for a reversal of the order appealed from is that the Court erred in refusing to set aside the default of the recognizance on motion of Appellants. Whether or not that is so de-

pends on whether the facts set up in the affidavits filed in support of the motion are sufficient to show that the failure of the accused to be present in Court according to the terms of his recognizance was due to his own negligence or design or was caused by some circumstance not within his control. The facts disclosed by the affidavits are that Appellant, Arthur Anderson, gave his recognizance in the usual form at the April term, 1920, of the Circuit Court of Ford County and that his case was then continued to the next term of that Court which convened in August, 1920; that almost immediately thereafter he left the jurisdiction of the Court and went to a place in the State of Wyoming 55 miles from Gillett which was the nearest place where mail could be obtained and so far as it appears left no word with any person where he was going or how long he expected to remain away; that not even his lawyer knew his whereabouts or how to reach him; that nothing was seen of him thereafter by anybody in Ford County until December, 1920, and that he did not go to the post-office more frequently than every fifty or sixty day. He says in his affidavit that he went to Gillett in the latter part of July, 1920, and stayed there a month in quarantine. He also says he went back to his claim the first week in August, 1920, (which locates him in two places at the same time), and that he was there confined to his bed most of the time until September 10, 1920. In the next paragraph of his affidavit he says he remained on his claim until September 28, 1920. No explanation is made why he did not communicate with his Attorneys during the time he was in quarantine in Gillett although it is disclosed that both mail and telegraph were there available. He further states that he found out some time after September 28, 1920 that his recognizance had been forfeited but he did not appear in Ford County until December, 1920.

The impression left from a consideration of those affidavits is that he was at least heedless of his obligation to appear for trial under the indictment if he did not deliberately and intentionally ignore it. We think the trial judge was well within the proper exercise of his judicial discretion when he refused to set aside the default.

Appellants next complain of the action of the Court

in sustaining the demurrer to their second and third pleas. The second plea set up the motion to set aside the default together with the affidavits filed in support of it and was bad. For the reasons already stated those facts constituted no defense to the **Scire facias.** The third plea is a denial of some of the facts charged in the indictment. It is wholly immaterial on the question of liability on a forfeited recognizance whether the Defendant is guilty or not guilty of the charge made in the indictment. **People v. Rubright** 241 Ill. 600.

Other errors have been assigned but they are without merit. The judgment entered by the Circuit Court was in the correct form, **Landis v. People** 39 Ill. 79; **Burrall v. People** 103 Ill. App. 81, and was the only one that could properly have been entered under the circumstances shown by this record.

Judgment affirmed.

General No. 7299 Agenda No. 16

April Term, A. D. 1921

John D. Hembrough, Appellee,

vs.

John Barton Payne, Director General of Railroads, Appellant

Appeal from the Circuit Court of Morgan County

GRAVES P. J.

223 I.A. 653

Appellee shipped three carloads of cattle from Woodson, Illinois to the Union Stock Yards at Chicago over the Chicago and Alton Railroad. He claims they were not transported to their destination within a reasonable time and that they were in other ways mishandled in such a way as to injure their market value to the extent of $780.25. To recover such damage he brought this suit. He secured a judgment of $531.68. From this judgment the Director General of Railroads has appealed and has filed an abstract of the record consisting of 129 pages, and a brief and argument that contains 35 pages of printed matter. The transcript of the record contains 200 pages. In his brief Appellant has argued the admissibility of evidence, the weight of the evidence, the corrections of several instructions, the law of negligence as applied to delay in transporting live stock from several angles, the measure of damages, and numerous other co-related subjects, but Appellee has failed to file any brief or argument whatever.

The rules of this Court provide that if the Defendant in Error or Appellee shall fail to file his brief, the judgment or decree being reviewed will be reversed **pro forma** unless the Court on examination of the record shall deem it proper to decide the case on its merits. The judgment in this case is sufficiently large and the questions involved of sufficient importance and difficulty to warrant Appellee in taking some interest in this appeal. If he does not care to help the Court come to a correct

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determination of the questions presented, he certainly can not expect the Court to become his advocate.

The judgment of the Circuit Court is reversed **pro forma** for failure of Appellee to file a brief and the cause is remanded to that Court.

Reversed and Remanded.

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General No. 7221 Agenda No. 3

April Term A. D. 1921

Frank P. Illman, Defendant in Error

vs.

Elza Kruse, et al, Plaintiff in Error

Appeal from Schuyler.

223 I.A. 654

HEARD, J.

Defendant in error filed his bill in chancery in the Circuit Court of Schuyler county against plaintiffs in error alleging among other things that Frans H. D. Kruse died seized of 90 acres off North side of the South West quarter of Section Twenty-eight, Township Two, North, Range One West, Schuyler county, Illinois; that he died testate July 4th, 1899, leaving Elizabeth Kruse his widow, James F. P. Kruse, Franz H. Kruse, George W. Kruse Susannah Greer and Doris Matthews his children; that his will was admitted to probate, Aug. 19, 1899; that the fifth clause of his said will gives the above described real estate to the widow for her life, orders that at her death it shall be sold by the surviving executor, and the proceeds divided equally among the above named children; that George W. Kruse died prior to Elizabeth Kruse leaving plaintiffs in error as his widow and children and only heirs; that on May 2nd, 1900, he for valuable consideration assigned his interests in said estate to Franz H. Kruse; that Elizabeth Kruse died May 24th, 1919; that on May 2nd, 1900, George W. Kruse by written instrument assigned his interest in the estate of Franz H. D. Kruse to Franz H. Kruse for valuable consideration; that on Nov. 8th, 1912, Franz H. Kruse for valuable consideration assigned his individual interest and the interest of George W. Kruse to Robert P. Kruse; that by written assignment the complainant acquired the interest of Robert P. Kruse and all the other heirs of Franz H. D. Kruse deceased, to the above described real estate; that by virtue of same complainant became the equitable owner of said land, and elects to reconvert the funds arising from the sale of said land into land; that Franz Henry Kruse as executor threatens to sell said land under the authority given under said will. Bill makes plaintiffs in error and other parties defendant and prays that the court will decree that the complainant holds the legal title to said premises and enjoin Franz Henry Kruse from selling said land under the

power given him by said will; that the court will decree the legal title of said real estate to be in the complainant; that the court will decree and confirm complainant's election to reconvert the money arising from the sale of said real estate into lands and decree the legal title in in the lands to be in the complainant; that the court will decree the complainant is entitled to immediate possession of said premises, and all of the same, subject to the rights of the tenant James Parks to cultivate

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and remove

his crops from said premises.

Plaintiffs in error answered the bill denying that George W. Kruse ever sold or assigned his interest in said real estate. A hearing was had and the circuit court entered a decree which is in part as follows: "And it is further hereby ordered and decreed by the court that the said Frank P. Illman is the owner of said real estate and that the legal title thereto be and the same is hereby decreed to the in the said Frank P. Illman as fully and completly and to all intends and purposes and with like legal force, and shall be so considered and held both in law and in equity, as though he had received a deed of conveyance thereto from the said Franz H. D. Kruse in his lifetime or from the said Franz Henry Kruse as executor, or deeds from the said Susannah H. Greer, George W. Kruse, Franz Henry Kruse, Doris Mathews, and James F. P. Kruse.

And it is further ordered, adjudged and decreed that the title in said real estate be quieted in the said Frank P. Illman, and is hereby fully and completely vested in the said Frank P. Illman, both legally and equitably. To review his decree Plaintiff in Error has sued out a writ of Error.

It is apparent from an inspection of the bill, answer and decree that a freehold is involved in this case and that the appeal should have been taken directly to the Supreme court.

The Clerk of this court is therefore directed to transmit the transcript and all files herein to the Clerk of the Supreme court.

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(2175a)

General No. 7247 Agenda No. 2

October Term, 1920

Phebe Brady, Appellant

vs.

Everett Boren, Appellee

Appeal from Circuit Court of Adams County

223 I.A. 654

HEARD, J.

Appellant while riding in a one horse buggy, with her nephew, the owner and driver in charge, was injured by reason of the left rear wheel of the buggy being struck by an automobile, operated by appellee, as the automobile attempted to pass the buggy going in the same direction.

Appellant brought suit against Appellee to recover damages for her injuries and a jury trial resulted in a judgment in bar for appellee against appellant from which judgment appellants has appealed.

Appellant, with the exception of one ruling upon the admission of evidence as to which the court was clearly right, makes no complaint in his brief and argument of the action of the court in the admission or exclusion of evidence, or the giving or refusal of instruction but devotes the entire argument to the question of whether or not the verdict was contrary to the manifest weight of the evidence.

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It is conceded by appellee that appellant was not guilty of contributory negligence.

The declaration consists of three counts. The negligence with which appellee is charged in the third count is the failure to honk a horn to give warning of the approach of the automobile. Five witnesses testify that the horn was sounded while appellant and her driver testify that they did not hear it although they were otherwise warned of the approach of the automobile.

The negligence with which appellee is charged in the second count is a failure to keep a look out a head. Three witnesses testify that he did keep a lookout a head and did see the buggy and attempted to avoid it while no one testifies that he did not keep a look ahead.

The first count contains a general charge of negligence in the management and operation of the automobile resulting in the collision and injury to appellant. Appellant and her nephew testify to a state of facts,

which, if believed by the jury, would warrant them in finding appellee guilty of negligence proximately causing the injury, on the other hand appellee and two men who were in the automobile with him testify that as they approached the buggy from the rear, the driver of the buggy looked back and saw them; that he then started to turn out to the right; that the driver of the automobile then started to pass on the left; that the driver of the buggy then

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pulled back in the beaten track; that the driver of the buggy then again turned to the right; that the driver of the automobile again started to go around on the left side of the buggy and the collision occurred. These three witnesses testified to a state of fact which if believed by the jury, would warrant them in finding that appellee was not guilty of negligence, or that the driver of the horse drawn vehicle was guilty of negligence, and that his negligence was the proximate cause of the injury in either of which events their verdict would be for appellee. It was purely a question of fact for the jury and in the conflicting state of the evidence, we would not be warranted in disturbing their finding.

The judgment is affirmed.

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General No. 7295. Agenda No. 12.

April Term A. D. 1921

Fred Rhoads, Administrator Estate of Harriett Terrell, Deceased, Appellant,

vs.

A. B. Huston, Executor Estate of William Terrell, Deceased, Appellee.

Appeal from Circuit Court Edgar County.

223 Ill. 654

HEARD, J.

The abstract in this case does not disclose the nature of the action, what proceedings were had in the circuit court or what errors were assigned upon the record.

It is a well settled rule of law in this state that a court of review will search the record for grounds upon which to affirm a case, but will not do so to find error and it has been repeatedly held by this court that where the abstract is so imperfect as to render it impossible to acquire from it any correct idea of what transpired in the court below the judgment will be affirmed pro forma. P. S. G. & E. Co. vs. Wrede, 217 Ill. App. 407. In re Smalley, 217 Ill. 488; Sellers vs. P. P. Co. 217 Ill. App. 617.

The judgment is affirmed.

General No. 7298 Agenda No. 15

April Term, A. D. 1921

Adolph Hunziker, Appellee

vs.

Thomas A. Mulcahey and Katherine A. Mulcahey

Appellants

Appeal from Tazewell. 223 I.A. 654

HEARD, J.

This is a suit brought by appellee against appellants husband and wife, upon a promissory note for $1000 with interest at the rate of six per cent per annum, signed by appellants, dated Sept. 29, 1910, and payable to the order of appellee Feb. 15, 1911. The declaration consisted of the common counts and a special count on the note, and attached to it was an affidavit of plaintiff's claim. Appellant filed a plea of the general issue and affidavit of meritorious defense, setting up that the note was a forfeiture note given by appellants in case they did not carry through a certain real estate transactions and was not to be collected if said transactions were carried out and that said transactions had been carried out. On Dec. 3, 1918, the cause was called for trial before a judge other than the one before whom the present case was tried. During the progress of the examination of jurors, appellant asked and obtained leave to file instanter and did file an additional plea of failure of consideration with an affidavit of merits. Thereafter the trial proceeded. A jury was sworn to try the case and during the examination of witnesses appellants asked leave to file additional pleas verified by affidavit of meritorious defense. This was denied and the trial proceeded resulting in a judgment for appellee against appellants for $1468.16. From this judgment an appeal was taken and the judgment reversed by this court for error in refusing to allow the filing of said additional pleas. Hunziker vs. Mulcahey, 215 Ill. App. 508.

Upon the cause being redocketed in the circuit court by leave of court, appellants filed an additional plea of release and an additional plea of payment which pleas were also verified by affidavit of merits. Issues were joined, the cause again tried by jury and a judgment rendered by the court for $1,599.15 in favor of appellee against appellants.

It is contended by appellants that the verdict of tne jury was against the manifest weight of the evidence.

Appellee to maintain the issues in his behalf introduced the note sued on in evidence and rested his case.

Appellant Katehrine Malcahey did not actively participate in the transaction further than signing her name to the papers and hereinafter when the term "appellant" is used it will be understood as referring to Thomas A. Mulcahey.

On July 25, 1910, appellee through the negotiations of appellant entered into a written contract with one A. H. Nichols for the purchase from him of 170 acres of land. The consideration was $35,000 payable $2,000 in cash in hand, and a mortgage of $15,000 taken back for a period of five years, and the balance of $18,000 payable in cash on February 15, 1911, on which date the deed was to be delivered, and the transaction completely closed. At the time of this purchase appellee only desired 80 acres of said land and had arranged with the appellant, Mulcahey that he should re-sell 90 acres thereof. Forty acres was re-sold to John Schurter by written contract for a consideration of $9,000 payable on February 15, 1911, on which date the deed was to be delivered, and the contract fully and completely executed.

There was an agreement between appellant and appellee that the remaining 50 acres should be sold so as to net the appellee $7500, as contended by appellants or $8500 as claimed by appellee. Appellant began to look for a purchaser and found Mr. Cooney wanted to buy, but had city property that he wanted to put in at a higher price than it was worth and the 50 acres was raised to $10,000 as its selling price. This town property was 50 feet off the north end of two lots in the Village of Tremont. Cooney offered the fractional lots and $5,500 for the 50 acres. Appellee said he did not want the city property at any price, that he needed all his money to pay for the 80 acres. Appellant then told plaintiff that he would take the fractional lots and with that understanding, two contracts were entered into on the same day, the contract from Hunziker to Cooney, agreeing to convey the 50 acres to Cooney and to take $5,500 in cash and the village property, payment to be made, deed delivered and contract fully performed on February 15;

1911. On the same day as the execution of the Cooney-Hunziker contract, to-wit: September 29, 1910, and in accordance with their arrangement, a contract was entered into between appellee, on the one part, and appellant, Katherine Mulcahey on the other part, for the sale of the village property to Katherine A. Mulcahey. The consideration recited in said contract is $4,500. Both appellant and appellee state that this was not the true consideration. Said contract further recites that $3,500 was paid cash in hand, receipt of which was thereby acknowledged and that the remainder of said purchase money is due and payable February 15, 1911, at the First National Bank of Tremont, Illinois; deed to be executed by appellee and placed in escrow with the First National Bank of Tremont, Illinois, to be delivered to second party at the time of the payment of the purchase money therein described.

The main controversy in the case is as to what was the real consideration for the sale of this city property. Appellee testified that the consideration to be paid was $3500, $1,000 of which was represented by the note in question, $2,000 to be paid Feb. 15, 1911, and the balance $500 retained by appellant as commission on the main real estate transaction. Appellant testified that the consideration was to be $2,000, $1,000 of which was to be the note in suit, and the remaining $1,000 to be paid, Feb. 15, 1911.

October 1, 1910, appellant gave appellee a check for $250. February 17, 1911, he gave him another for $450 and on March 1, 1911, another for $1300, which latter contained the words "in full for property." Appellant claims that this latter check was in full settlement of the whole matter including the note in question and testified that on March 1, 1911, he gave appellee the $1300 check at the First National Bank in Tremont; that at that time he asked appellee if he had the $1,000 note there with him; that appellee said he had forgotten to bring it with him, but would go right back and get it; that appellant told appellee that it was not necessary to do so; that he could hand appellee the note or destroy it and that appellee said he would do so or if at any time appellant was by there to stop in and get it; that he dismissed it from his mind and never thought of it. Appellee testified that at the time of getting the $1300 check the $1000 note was not

mentioned at all and contradicts all of appellants' testimony on that subject.

The controversy resolved itself into a pure question of varacity between appellant and appellee and in view of appellant's contradictory affidavits of merits we cannot say that the jury were not justified in giving credence to appellee rather than to appellant.

When the issue is purely one of fact it is the special province of the jury to determine it and when their verdict has been approved by the trial judge, who saw the witnesses and heard the testimony their finding will not be disturbed by a court of review unless manifestly against the weight of the evidence. This rule is so well settled in this state as not to require the citation of authorities.

The case was tried and a motion for new trial overruled at the September 1920 term of court. Appellant excepted to the action of the court in overruling the motion for new trial and prayed an appeal which was not perfected. The September 1920 term of court adjourned without a judgment having been entered and without any minute of such judgment having been made by the judge. clerk or other official of the court. At the November 1920 term of said court upon motion of appellee the cause was redocketed and on Dec. 27, 1920, judgment was entered as of that day upon the verdict. Appellants claim that this was error. No judgment having been entered upon the verdict at the Sept. 1920 term. At the end of that term the cause was a cause pending and undisposed of and by the statute of the State it automatically stood continued until the next term of court. Sec. 56. Chap. 57, Rev. Stats. Ill. People vs. Nooman, 276 Ill. 430.

Upon cross examination appellee having stated that he had sold the note in question was asked "Who does own it?", to which question the court sustained an objection. This ruling is assigned for error. The action of the court was right. Appellee having filed with his declaration an affidavit of claim, appellants were limited in their defense to such matters as were stated in their affidavits of merits. Complaint is also made of the exclusion of other evidence offered by appellants. The questions asked called for the conclusion of the

witness and

were improper.

Complaint is made as to the giving of one of appellee's and the refusal of four of defendant's intsructions. Of the refused instructions one was not based upon the evidence and the material points of the others were contained in other given instructions. We find no error in the giving or refusal of instructions.

The judgment is affirmed.

Justice Niehaus took no part.

General No. 7304 Agenda No. 21.

April Term, A. D. 1921

John W. Luttrell, Appellee,

vs.

Charles E. Wyatt and Margaret J. Wyatt, Appellants
Ralph Luttrell, Ralph Luttrell, Trustee, and H. L. Child,
Appellees,

Appeal from Sangamon.

223 I.A. 654

HEARD, J.

In this case appellee filed his bill in the circuit court of Sangamon county to vacate and set aside a prior decree of said court upon the ground that the prior decree had been obtained through fraud. After amendments had been made to the bill a demurrer to the amended bill was sustained by the court and the bill dismissed. Appellee prayed an appeal to this court and upon hearing this court held that the circuit court erred in sustaining the demurrer and remanded the cause for further proceedings. After reinstatement in the court below answer was filed denying fraud and alleging laches. The cause was heard and a decree in favor of appellee was entered setting aside the former decree for fraud and requiring appellants to pay appellee the amount of the promissory notes, the collection of which had been enjoined by the decree vacated. From this decree the present appeal is taken.

The bill is extremely lengthy and the alleged facts upon which it is based are set out in full. In the former opinion of this court the material allegations of the bill are set out in full and for a statement of such altigations reference is hereby made to such former opinion. Luttrell vs. Wyatt, 214 Ill. 655.

The evidence in the present case tends to support all the material allegations of the bill and this court in its former opinion held proof of such facts would be sufficient to maintain the bill.

While the personal of the court has changed since the former hearing, yet the decision of the court on the former hearing is the binding law of the case so far as the present hearing in this case is concerned. The evidence was lengthy and conflicting on many of the

material points and no good purpose would be subserved by setting it forth in full. The Judge who saw and

heard the witnesses found in favor of appellee and his finding as to the controverted questions of fact has the same force and effect here as the verdict of a jury. Under the evidence in the case we would not be justified in setting aside his finding of fact.

The decree is affirmed.

General No. 7308 Agenda No. 24

April Term, A. D. 1921

In Re Estate of George Carnes, Deceased, Thomas Miller, Guy Williamson, Guardian et al, Appellants

vs.

Fred H. Farrand, Administrator with the Will Annexed, Appellee

Appeal from Circuit Court Pike County.

223 I.A. 655

HEARD, J.

George Carnes of Griggsville, Pike County, died July 19th, 1917, leaving a widow, Margaret Carnes, him surviving, but no children, and by his last will and testament nominated his widow as executrix and after giving a life estate in all his property to her, provided that after the payment of $14,500 in specific legacies, the residue of his property should be divided among twenty nieces and nephews. Margaret Carnes on August 2, 1917 filed in the County Court in writing, her declination of the appointment as executrix and requested the appointment of Fred H. Farrand as administrator with the will annexed. Farrand was appointed as such administrator and qualified giving a personal bond.

The widow filed in the county court her renunciation of the will and elected to take her statutory share of the estate of her husband.

At the March 1920 term of the county court Farrand as such administrator exhibited to the county court his final account for settlement. Various objections were made thereto by appellant and after hearing the court overruled the objections except the objection to an item for interest paid upon a legacy and approved the account except as to such item, which item was disallowed. From this action of the court appellants appealed to the circuit court of Pike County and upon hearing in that court the action of the county court was approved in all particulars and appellee's account was approved except as to said item of interest. From this order the present appeal has been perfected.

There were seven objections made by appellants as to the items with which the executor charged himself and five as to items for which he claimed credit. Appellants in their brief as to six of the objections as to the

items on the debit side say that "the item is stated in such a vague, indefinite and careless manner as to be practically unintelligible." The abstract filed by appellant does not comply with the rules of this court in many respects. It does not contain an index of the exhibits and from it it is impossible to ascertain whether certain alleged exhibits were introduced in evidence or what their function as exhibits were. Appellee's account for settlement, which with the objections thereto, were the basis for the adjudication, does not appear in its proper place in the abstract. A search of the abstract reveals the statement "exhibit 2 is the final report of Fred H. Farrand administrator, to which objections and exceptions have been taken." Without any connection with this statement being shown there follows what purports to be, and we shall for the purpose of this appeal assume, to be, appellee's final account for settlement and request for discharge as administrator. An inspection of the items covered by the six objections above mentioned shows that they are items of monies received by appellee entered in the statement in the manner in which such items are usually entered in such accounts. Appellee, when a witness upon the hearing was interrogated as to these items and their correctness and no evidence was offered by appellants tending to show that they were not correct.

Appellants contend that the first item with which appellee charged himself. "Cash as per inventory $9,307.-82" is not correct in fact. The evidence shows that prior to appellee's appointment as administrator with the will annexed certain grain and stock was sold by the widow and a person other than appellee, the money deposited in the bank and when appellee became such administrator $9307.82 was the exact amount of cash which he received. The objection therefore was properly overruled.

Appellants claim that the allowance of $2310.23 for appellees commission as such administrator was excessive. The real estate was worth about $125,000 and the personal property about $35,000. Appellee received and disbursed over $45,000, a portion of this sum coming to him as a portion of the proceeds of a partition sale. Appellee, as a witness, testified to the services rendered by him, the time devoted to the business of the estate and the estimated number of miles travelled. He had acted

in the same capacity at other times and he and two other witnesses who had performed like services several times, testified that the services were

reasonably worth $2310.26. Appellants offered no evidence to the contrary. The judge of the county court and the judge of the circuit court, who saw and heard the witnesses, allowed this sum and we would not be justified in setting aside their finding. Kuehne vs. Malach, 286 Ill. 120.

Appellants object to the item "Williams & Williams Attorneys fees, $1,000." The objection as stated is "the item claiming a credit of $1,000 on account of attorney's fees to William & William is objected to, and it is submitted that the same ought to be itemized in such manner as to show the particular services for which the fee is claimed." Were this a claim of the attorneys for their services this objection might well be urged, but it is not. It is the claim of appellee for a credit in his account by reason of having made one payment of $1,000 to Williams & Williams for attorneys fees and there was no occasion to itemize the fees in appellees account. It is also claimed that at times this firm represented the widow and not the estate. The undisputed testimony is that the widow paid for the legal services tendered her and that no charge was made against the estate for any services rendered. A. Clay Williams, a member of the firm testified in detail to the rendition of the services and that they were reasonably worth $1,000. The judges of the county and circuit court both heard the evidence and saw the witness and approved the allowance of this item and in this state of the record to set aside their finding would be unwarranted.

It is urged by appellant that the court erred in allowing appellee credit for $917.10 paid Carpenter & Stover for a monument erected over the grave of deceased.

The evidence shows that appellee considered deceased a man of considerable property and as he said in his testimony "there's nothing in the world we can do for a man after he dies except give him a decent funeral" and he considered that deceased should have a suitable monument erected over his remains and that, considering the widow the proper person to select the same, he sent the monument salesman down to her to let her look over

the samples, but gave no instructions as to her signing the

contract which she did.

Thereafter appellee filed a petition in the county court setting up the facts and asking leave to assume the monument contract and pay for the same out of the funds of the estate. The county court denied the petition whereupon appellee prayed an appeal to the circuit court, where, after the overruling of a motion by appellants to dismiss the appeal, both parties appeared. A hearing was had and the circuit court very properly ordered appellee to pay for said monument out of the funds of the estate as a part of the funeral expenses of said deceased. Appellants contend that this order of the county court was a nullity because after the appeal was allowed by the county court no transcript of the county court proceedings were filed in the circuit court. From the condition of the record in this case we are unable to say whether or not such transcript was filed. Such transcript does not appear in the record neither does there appear any positive proof that no such transcript was filed. Upon the appeal from the county court to the circuit court being allowed it became the official duty of the county clerk to make a transcript of the county court proceedings for filing in the circuit court. In the usual and ordinary course of procedure such transcript is filed in the circuit court before the circuit court assumes jurisdiction of the case and the parties appear and try the case.

It is a well established rule of evidence that every officer is presumed to have performed his official duty and that, that which according to the common experience of mankind usually happens in the usual and ordinary course of business, is presumed to have happened in a particular case until the contrary appears from the evidence. Mayer vs. Krohn, 114 Ill. 574; Ashley Wire Co. vs. Ill. Steel Co. 164 Ill. 149; Paden vs. Rockford Palace Furniture Co. ——Ill. App. (2nd Dist. October 1920 Term); Cone vs. Jeffries, 7 Allen (Mass) 548; State vs Gritzinger, 36 S. W. 39; W. T. Co. vs. Wright, 78 N. W. 942; Oregon Steamship Co. vs. Otis 3 N. E. 465; Perry vs. I. A. B. 73 N. W. 538. It will therefore be presumed in this particular case that the transcript of the county court proceedings was filed in the circuit court before

the appeal was heard in the circuit court.

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We are of the opinion that appellee was entitled to credit for the amount paid for the monument.

The order of the circuit court appealed from is affirmed.

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General No. 7311 Agenda No. 27

April Term A. D. 1921

C. H. Cooper, Appellee

vs.

John Barton Payne, Agent of the United States, Etc., Appellant

Appeal from Circuit Court Pike County.

HEARD, J.

This is a suit brought by appellee claiming that while the Director General of Railroads was in the control and operation of the lines of the Chicago & Alton R. R. Co., he negligently caused the death of six hogs of appellee while being carried from Nebo, Ill., to the National Stock Yards at East St. Louis, Ill. No judgment is shown by the abstract filed by appellant in this case as required by the rules of this court. It has been repeatedly held that when the abstract does not conform to the rules of the court, that the court is not required to search the record, but may affirm the case **pro forma.** P. S. G. & E. Co. vs. Wrede, 217 Ill. App. 407; Sellers vs. P. P. Co. id. 617; in re Smalley, id. 488. The record discloses that a judgment was rendered in favor appellee against appellant for $321.90 damages and costs and we have considered the case upon its merits.

The praecipe and summons purport to be in assumpsit, but the original declaration which consisted of two counts alleged appellants liability to be a failure to safely carrying a shipment of appellees hogs from Nebo, Ill. to the National Stock Yards at East St. Louis, Ill., and negligently causing the death of six of such hogs and for a failure to deliver the shipment within a reasonable time, thereby causing the death of said six hogs. To this declaration appellant pleaded the general issue and four special pleas. The first special plea was that the carriage in question was made under an express shipping contract in writing; that in said contract, appellee agreed for value to take personal care of the stock in transit by watering and otherwise tending the same and he expressly relieved the carrier there from, but that the appellee failed to take care of the stock and that by reason thereof and not on account of any negligence or fault of the carrier or of the agents and servants of the Director-General, the several injuries were

caused and not otherwise.

The second special plea set out similar averments with copy of the contract and that the plaintiff failed to comply with the condition of the contract which required that within four months of the delivery of the stock claims must be made in writing to the carrier at the point of delivery or at the point or origin and that the plaintiff failed to comply with this condition.

The third special plea set out the contract and that at and before and during the time of carriage of such shipments, the government of the United States had taken over primarily for government use the line of the Chicago &

Alton Railroad Company and all connecting lines between Nebo and the said point of delivery, that at and during said times said lines of railroad so taken over by the government were congested with an excess amount of government and other freight and the terminals and switches between the point of shipment and point of delivery were congested and over-burdened with public and private freight; that at and during said time an excessive and unusual amount of freight was carried to said National Stock Yards by and over divers lines of railroad and that any delay in the delivery of said shipment to the consignee, if there was any such delay, was caused directly and necessarily by these conditions and not by any negligence on the Director-General or of his agents or servants operating the lines of the Chi. & Alton Railroad company, nor on the lines of any connecting carrier; that the said Director-General then and there provided and furnished for said shipment good and sufficient cars and other railroad equipment for such shipment and a reasonably sufficient force of train men to carry said shipment within a reasonable time; that in fact there was no delay in carrying said shipment over the line of the Chicago & Alton Railroad Company; that said shipment was in fact delivered to the consignee within a reasonable time under all the surrounding circumstances.

The fourth special plea was similar to Plea four except that it charges with much more particularity the provisions made for carrying promptly live stock under the ordinary and usual conditions of traffic; it then avers that on the morning of the 17th of June, 1919, after

this shipment had been accepted, and had been carried to a point at or near the said National Stock Yards, and before the arrival of the train at the yards, an unforeseen, unusual and unprecedented congestion of freight traffic there arose at, in and on the tracks, switches and terminals of the said National Stock Yards in this, to-wit: that on the morning of said June 17th and before 9:10 a. m. of said day more than 500 cars of live stock arrived there for delivery to the National Stock Yards; that the said stock of the plaintiff reached and was carried to said National Stock Yards promptly and in due time and at 9:10 a. m. of that day; that it was then and there the custom and duty of the carrier and of said National Stock Yards to place and unload the cars of live stock in the order of their arrival at said Yards; that said unusual and unforeseen condition of congestion was not or could not have been foreseen or provided for by the exercise of ordinary diligence in the premises on the part of the Director-General and connecting carrier; that on the arrival of said live stock of appellees at said Stock Yards at 9:10 a. m. of June 17, 1919, the said Director-General and connecting carriers had then provided and furnished sufficient employees and facilities to deliver and unload the ordinary and usual quantity of stock but that by reason of the unforeseen,

and unusual condition above set forth and not through or on account of any negligence of the Director-General or connecting lines of said Stock Yards, the said stock of appellee was unavoidedly and necessarily delayed in unloading.

Issues being made a jury was selected and the evidence heard. After appellee had made his opening argument and after appellant had made one of its arguments the appellee by leave of court filed two additional counts to his declaration. Additional count one was a substantial repetition of original count one, and makes no reference whatever to a written shipping contract. Additional count two charges on the shipping contract in writing as the same had been set out in appellant's plea two; avers performance of all the terms and conditions on his part to be performed and charges that the Director-General did, by negligence and delay, cause the death of six hogs.

Appellant contends that the action of the court in allowing the additional pleas to be filed was error. The

action of the court in this regard was not error. Sec. 39 Chap. 110, Rev. Stats. of Ill., provides that at anytime before final judgment in a civil suit amendments may be allowed on such terms as are just and reasonable * * * changing the form of action, and in any matter either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense. See also Sec. 1, Chap. 7, Rev. Stats. of Ill. If appellant had other evidence which he desired to offer in view of the changed pleadings he could have asked to have the case reopened and submitted his evidence or if he was taken by surprise and the evidence was not at hand he could have asked to have a juror withdrawn and the case continued.

Appellant claims that as the contract of shipment provided that appellee would take personal care of the stock in transit, by watering and otherwise attending to the same and he did not do so he cannot recover. This clause of the contract was waived by appellant as this duty of watering and caring for the stock in transit was taken upon themselves by the employees of appellant and neither opportunity or facilities for watering or caring for the stock in transit were furnished appellee.

Appellant claims that there can be no recovery in this case because claim was not made to the carrier at the point of delivery or origin within four months after the delivery of the livestock. This position cannot be maintained because claims for damages in transit by carelessness or negligence are specifically excepted by the clause of the contract requiring such notice.

It is claimed the evidence does not show any such delay in the delivery of the hogs as to render appellant liable.

In T. W. & W. Ry. Co. vs. Lockhart, 71 Ill. 627, it was held that where a

common carrier contracts to forward and deliver goods at a certain point, it is the duty to so convey and deliver them within a reasonable time, and if it fails to do so, it is liable, whether it knew that its connecting line could not without unreasonable delay forward the goods or not and it will not be released from its liability by a delivery to another connecting

road, but will still be liable for any unreasonable delay, although the same occurs on account of the crowded condition of such connecting road where such liability is not guarded against in the contract.

The evidence shows that the train on which the shipment was made was slightly behind time in leaving Nebo, but arrived at Venice 2½ miles from the stock yards at 7:10 the next morning. At Venice the car was transferred to the Southern Railway to be delivered at the yards and by it delivered at the yards about 300 yards from the unloading chute at 9:10. The day was very hot and the car stood in the yards until 1:10 when it was taken to the unloading chutes.

There is evidence that when loaded at Nebo the hogs were in good condition and when the car arrived at Venice the conductor of the train inspected the stock and testified that there was nothing wrong as far as he could see there and that as far as he discovered the stock was in good condition.

When the hogs were unloaded at the chute five were dead and one cripped dying soon after.

The employees of the various railways and of the stock yards testified as to the handling of the car of stock, the conditions at the stock yards and the amount of stock received and unloaded on the day in question and the order in which it was unloaded.

That there was some delay prior to unloading the stock is not denied but appellant attempts to explain it by reason of the congested condition of the yards. Appellant also introduced evidence tending to show that the hogs died as a result of over exertion before loading and not by reason of the delay.

Whether or not there was an unreasonable delay in the delivery of the hogs to the unloading chute and whether or not the hogs in question died as the result of such delay were questions of fact which it was the peculiar province of the jury to determine. There was evidence in the case upon which to predicate their finding and we would not be justified in setting it aside.

It is claimed by appellant that the court erred in the giving, refusing and modifying of instructions. The court gave to the jury at appellees request 14 instructions. Appellant tendered and requested the court to give to the jury 30 instructions. Of these the court gave 13 as offered; modified and

gave 8 of the others and refused the remaining, of which refused instructions the greater number were not applicable to the case by reason of the change in pleadings. We have carefully considered the instructions, which are exceedingly lengthy, and the objections raised as to the court's action with reference thereto, and are of the opinion that the instructions as a series were fully as favorable to appellant as the law would warrant and that appellant has no just cause for complaint of the court's action with reference thereto.

The judgment is affirmed.

certiorari denied

General No. 7321 Agenda No. 36

April Term A. D. 1921

Andrew Grenias, et al, Appeelles

vs.

Earl Hill, Blanche Huff, Millie Snodgrass, and Fred Miller, Appellants

Appeal from Circuit Court Sangamon County.

223 I.A. 655

HEARD, J.

Appellees were the owners and operators of certain restaurants or eating places in Springfield, Ill. Sept. 17, 1920. A strike of all the union employees of these places was called, October 1, 1920. A bill of complaint was filed in the circuit court of Sangamon County, by appellees praying for an injunction restraining appellants and others from doing certain things in said bill enumerated and on said day a writ of injunction was ordered issued by a judge of said Court in accordance with the prayer of the bill of complaint. An injunction was issued accordingly and personally served upon appellants.

The injunction among other things enjoined appellants from in any wise, by force, threats, intimidation, interference with, obstructing or stopping the business of the complainants, their servants, or employees in the maintenance, continuance and operation of their respective business; from compelling, inducing, or attempting to compel and induce by threats, intimidation, force, physical violence, or other unlawful means, any of the complainants' employees to fail or leave their employ; from preventing or attempting to prevent any person or persons, pedestrians, or patrons of the complainants respectively, by threats, intimidation, force, physical violence, or other unlawful means, from freely entering the respective places of business of the complainants for the purpose of obtaining food, or for any lawful purpose; from in any manner combining, conspiring, or agreeing to attempt to injure the business or property of the complainants or to destroy, hinder, obstruct, or interfere with the prosecution of the complainants' business, by threats, intimidation, force or violance or from agreeing or attempting to injure the employees of the complainants respectively; from congregating, about in or near the premises, grounds, buildings, restaurants, cafes or property of the complainants or either of them for the purpose of threatening or intimidating or

annoying
the pedestrians and patrons entering the places of business of the complainants; from molesting, attacking, accosting, laying hold of or threatening or interfering with the employees of an patrons of the complainants respectively; or from gathering large and threatening forces and standing in front of the places of business of the complainants or in the alleys, approaches, entrances thereto, for the purpose of their presence of threatening, intimidating, or annoying the employees of the complainants and the patrons of the complainants or any person desiring ingress or egress from or to the places of business of the complainants respectively; from in any manner conspiring or combining to do or directing the doing by any person of any injury or bodily harm to servants, agents, or employees or patrons of the complainants or destroying the property, equipment, or places of busines of the complainants respectively; from maintaining at or near the premises of the respective complainants any body of men or women for the purpose of intimidating by threats, demeanor, violence, or coercion, or any unlawful means, any patrons or any employee or future employee of the complainants or persons who desire, or any and all persons, desiring ingress and egress to and from the respective places of business of the complainants; from unlawfully doing or attempting to do any unlawful act or thing in furtherance of the conspiracy set forth in this bill of complaint.

October 6, 1920, appellees filed in the circuit court a petition praying that appellants be attached for contempt, the petition and affidavits accompanying it setting up alleged acts of appellants which appellee claimed were in violation of the above quoted provisions of the injunction.

Attachments were issued and October 8, 1920, a hearing was had in the contempt proceedings, appellants being present and testifying in their own behalf. Oct. 11, 1920, the court entered an order finding that appellants were each guilty of violating the injunction theretofore granted in this cause in manner and form as set forth in the petition and affidavits, and that they should each be fined in the sum of fifty

dollars and costs, and that they be committed to the Sangamon County jail until the said fines and costs were fully paid.

From the entry of this judgment the present appeal to this court has been perfected.

Appellants contend that they were engaged in peaceful picketing; that peaceful picketing is not unlawful in this state and devote a large portion of their argument to this contention.

Appellants were not enjoined from peaceful picketing; the petition for attachment did not charge them with peaceful picketing and the question of whether or not peaceful picketing is lawful is in no wise involved in this case.

It is urged by apepllants that a respondent who honestly thought the order of the court did not forbid the doing of the acts which constitute the contempt should not be imprisoned. In the present case appellants were not sentenced to a term in jail but were fined and as a method of enforcing the payment of the fine and costs were ordered to stand committed to the county jail until the fine and costs were paid.

Courts of chancery are by statute given power to enforce their decrees by imprisonment. In the majority of cases like the present a mere fine without an order to commit the violator to jail until the fine and costs are paid would be a mere farce and the impecunious offender could violate orders of courts with impunity and render nugatory attempts to maintain the dignity of the court.

Appellants contend that their acts were in every way lawful and did not justify the punishment imposed on them.

Whether or not appellants acts were lawful is not the question in this case. It is the settled rule in this state that if the court has jurisdiction of the parties and of the subject matter, an injunctional order made in the exercise of such jurisdiction must be obeyed until it is modified or set aside by the court making it, or reversed in a direct proceeding by appeal or writ of error Lyon & Healey vs. Piano Workers Union 289 Ill. 176 Ash ? vs. Garment Workers Union 290 Ill. 301. The material question is "did appellants in fact violate the terms of the injunction?" It would serve no good purpose and unduly

prolong this opinion to recite the evidence in detail. There was sufficient evidence in the record to warrant the court in finding appelllants guilty

of violating the injunction if such evidence were believed by the court. While much of this evidence was denied by appellants, weighing the evidence was the province of the trial court, which possessed many advantages in this respect over a court of appeal. It is settled by law and established rules of practice in this state that when a case is tried before the judge without a jury the conclusion of the judge as to matters of fact should not be disturbed unless clearly wrong.

In this case the trial judge who heard the evidence found as a matter of fact that appellants had violated the injunction and we would not be justified in setting aside his finding. The judgment of the circuit court is affirmed.

General No. 7328 Agenda No. 42

April Term, A. D. 1921

Nancy E. Miller, Administratrix de bonis non of the Estate of Samuel Miller, deceased, Appellee

vs.

G. A. Stults, Administrator, etc., Appellant

Appeal from Logan County Circuit Court

223 I.A. 655

HEARD, J.

February 25, 1918, at the home of appellant, Geo. A. Stults, one Samuel Miller, a brother in law of Stults, died, leaving him surviving his wife, Nancy Miller, and two daughters, who had been living seperate and apart from him for five or six years.

On the day that Miller died Stults procured George J. Smith, his attorney, to prepare a widow's relinquishment of the right to administer and the next day went to her home at Springfield, Ill., and procured her signature thereto. March 9, 1918, Stults filed his petition in the county court of Logan county for letters of administration on Miller's estate, in the petition stating that the estate consisted of choses in action estimated to be worth about $340 and on that day was appointed as such administrator, giving bond in the sum of $700.

When Miller was taken sick at the home of Stults, he had in his pocket book a draft on the Illinois bank at Springfield for $340 and a note executed by Frank M. Elliot of Drexel, Mo., payable to Miller's order for $1000 and interest. On March 19, 1918, Stults collected the $340 draft and deposited the proceeds to his credit as administrator in the First National Bank of Mt. Pulaski.

Stults, as administrator, on March 21, 1918, fixed on May 2, 1918, as the date for the adjustment of claims against the estate and on the same day claims of Mrs. George A. Stults for care and keeping of Samuel Miller $100, of John T. Hershey for funeral expenses $146.75 and of Dr. Denison for medical attendance $14 were filed against the estate.

On April 12, 1918, Stults deposited to his credit as administrator of the estate of Samuel Miller, deceased, in the First National Bank of Mt. Pulaski $1011.83, the proceeds of the Elliott $1000 note which through the efforts of his attorney he had succeeded in collecting.

On April 22, 1918, Stults filed in the county court, as administrator, his inventory of the estate dated April

15, 1918, in which he charg-

ed himself with $1340 cash on hand which on the hearing he testified represented the $340 draft and the $1000 note. On April 23, 1918, he filed an additional bond of $2000. On this same day Stults filed a claim against the estate for "purchase price one team of horses $290; corn, $36; oats, $2.10; corn, $68; board and washing 3 years 1913-1915, $621;" making a total claim of $1020.10.

On June 8, 1918, an attorney of Springfield wrote Smith & Lincoln of which firm George J. Smith is a member asking for information as to the assets of the Miller estate and the claims filed against it, suggesting that Mrs. Miller would be entitled to a widow's award if there was any money with which to pay it, to which on June 18, 1918, George J. Smith, attorney for appellant, replied as follows:

"June 18, 1918

Mr. John L. King,
Attorney at Law,
Springfield, Ill.

Dear Sir:—In Re estate of Samuel Miller, deceased.

Replying to your kind favor of the 8th inst., relative to the above matter would state that at the time of filing the original petition we had no information of any additional assets except the $340 and so alleged in the petition, filing a bond in double that amount. Since the filing of the original petition we have learned of an additional $1000 asset and included it in the inventory and have since prepared an additional bond, so that the gross assets of the estate are $1340.

As to the matter of the widow's award we would state that we are advised that prior to the death of Mr. Miller he entered into a contract with Mrs. Miller adjusting their property rights. There have also been claims filed against the estate, aggregating an amount in excess of the available assets so that we do not anticipate that there would be any money with which to pay any widow's award even though she had not contracted prior to Mr. Miller's death relative to this matter.

Very respectfully,
Smith & Lincoln."

September 13, 1918, Mrs. Nancy Miller filed her petition in the county court asking for a revocation of the

letters of administration

granted to Stults on the ground of fraud and misrepresentation in obtaining her renunciation. The petition was heard and the court ordered that Stults be removed as administrator; that Mrs. Nancy Miller be appointed as administratrix and that Stults file his final report and account as administrator.

Feb. 22, 1919, Stults filed his petition for leave to amend the inventory and on July 16, 1919, filed his final report in which he charged himself with but $340 assets. In his petition to amend the inventory and in his final report he claimed that deceased, in his lifetime, delivered and transferred the $1000 note to Mrs. George A. Stults and that through inadvertance and mistake the same was inventoried as an asset of the estate.

Objection to report and petition was made by Nancy Miller, administratrix on the ground that the $1000 note in question was an asset of the estate. Upon hearing the county court overruled the objections and granted leave to Stults to amend the inventory by striking therefrom the item of $1000. From this order Nancy Miller appealed to the circuit court.

A hearing was had in the circuit court which resulted in the court entering an order denying leave to Stults, administator, to amend the inventory and sustaining the objections of the administratrix to said report and ordering that Stults, administrator, charge himself with the proceeds of the $1000 note, from which final order of the circuit court appellant has perfected this appeal.

Appellant bases the claim of Mrs. Stults ownership of the note in question upon the testimony of his daughter Florence Stults, who testified that Feb. 22, 1918, Miller while in bed sick at the Stults home asked her to go up stairs and bring down to him his pocketbook; that upon her doing so he called in Mrs. Jane Stults and handed over to her a draft for $340, stating that he wanted to be buried in Buckhart Cemetery and that he wanted the proceeds of the draft used to bury him; that he then took from the pocket book a $1000 note signed by Frank Elliot and handed it to Mrs. Stults with the statement that he gave it to her for what she had done for him; that Mrs. Stults then took both draft and note and placed them in her silver case in the pantry,

where they remained until after Miller's death; that the day after Miller's death her mother gave the note to her father; that about Feb. 23, after the relatives had all gone, her father and mother

in her presence discussed the conversation in which Miller gave her mother the $1000 note. Stults testified that he got the note from his wife after Miller died.

Nancy Miller testified that on Feb. 25, 1918, Stults came to her home, told of her husband's death and asked her to sign a paper which he had so that the undertaker could go ahead with the funeral: that she signed the paper without reading it; that Stults said the funeral expense would be $135 and that her husband had only $61.50 left; that on April 6, 1918, Florence Stults, the witness came to the Miller home in Springfield and in conversation with her in reference to the note in question said: "We wrote out to Kansas and could not hear anything, but got a lawyer after it, and we still don't know how much money there is, but there will be some for you and the children" and that in the same conversation she also said, referring to Miller "He did not talk any while he was sick; all the talking he did he was out of his head."

Emma Miller, a daughter of deceased, also testified to Florence Stults making these statements to Nancy Miller. Florence Stults denied making these statements.

Whether or not Miller in his lifetime gave to Mrs. Stults the note in question for what she had done for him was a question of fact to be detrmined by the court from a consideration of the testimony viewed in the light of all the surrounding circumstances.

The general rule undoubtedly is that positive testimony of a witness, uncontradicated and unimpeached either by positive testimony or by circumstantial evidence, either intrinsic or extrinsic, cannot be disregarded, but must control the decision of a court or jury. People vs. Davis, 269 Ill. 270; Larson vs. Gloss, 235 Ill. 584; Kelly vs. Jones, 290 Ill. 375. There may however, be such inherent improbability or unreasonableness in the testimony when viewed in the light of all the other testimony and facts and circumstances in evidence as to justify the court in disregarding it even in the ab-

sence of direct contradiction. Kennard vs. Curran, 239 Ill. 122; Kuehne vs. Malach, 286 Ill. 120.

The trial judge saw and heard the witnesses and had advantages

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which we do not possess in judging of the weight that should be given to their testimony. Under the law and established rules of practice where a case is tried before a judge without a jury, the conclusions of the trial judge as to questions of fact should not be disturbed unless it clearly appears from the record that such conclusions are wrong. Kuehne vs. Malach, supra.

Appellant claims that the court erred in refusing the following proposition:

"The court holds as a matter of law that where Samuel Miller owed a promissory note payable to his own order, signed by one Frank Elliott for the sum of One Thousand Dollars ($1000.00) and then and there with the express intention of transferring said promissory note to Mrs. George Stults, his sister, delivered the said note to said Mrs. George Stults without endorsing same, and she accepted said note and retained possession thereof until his death, then the said Mrs. George Stults would be the equitable owner thereof and entitled to the proceeds thereof." This proposition assumes the main controverted questions of fact and the court finding adversely to appellant on these questions the proposition was properly refused.

The order of the circuit court is affirmed.

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General No. 7332 Agenda No. 45

April Term A. D. 1921

W. W. Hinds, Appellant

vs.

W. U. Hutchinson and W. H. Perisho, Appellees

Appeal from Circuit Court Edgar County.

HEARD, J.

This is an action of fraud and deceit brought by appellant against appellees. The fourth count of the declaration, upon which, and the plea of the general issue thereto, the case was tried, alleges that appellees conspired to defraud appellant out of 125 acres of his land in Edgar County; that as a part of said conspiracy appellee Hutchinson induced appellant to rely upon and place confidence in his statements; that said Hutchinson acted as the agent of appellant and while so acting as such agent induced appellant to exchange said 125 acres of land worth $12,000 for a farm in Crawford county worth $500; that said Hutchinson intending to deceive appellant represented to appellant that said land in Crawford county was worth $100 per acre, was on a large oil field and that there was fine oil underneath it and that if appellant would take said land in exchange for his Edgar county land that as a business proposition it would get him out or debt and solve all his financial difficulties; that said representations were false and that appellee Hutchinson knew them to be false; that relying solely upon said representations appellant consented to and did make exchange of said land.

A trial resulted in a verdict for appellees and judgment in bar in favor of appellees against appellant, from which judgment appellant has appealed to this court.

It is contended by appellant that the verdict is against the manifest weight of the evidence.

Appellant tesitfied that in the summer of 1915 he was living on his 125 acre farm in Edgar county; that he had known appellee Hutchinson 35 or 40 years; that in the latter part of June said Hutchinson came to appellant when appellant was working in his corn field and said he would like to trade appellant's farm for a farm in Crawford county; that Hutchinson said "you had better trade it. I am a friend to you. I am doing it just for your benefit and it would make you money;" that appellant told him he did not believe he wanted to trade

at that time; that three or four days after that he came to appellant's farm again; that Emmet Scott was with him; that Hutchinson said they were passing and stopped to see if they could trade appellant that farm; that Hutchinson said the Crawford county farm as a farm outside of oil and gas was worth $100 an acre;

that there were two gas wells on it and oil all around it and that land around there sold for $100 to $125 an acre; that appellant told them he would study about it; that inside of a week Hutchinson came to the farm again with a Mr. Merrick; that Hutchinson said Merrick and his son in law were partners in the Crawford county farm; that they wanted to dissolve partnership and would give him a better bargain than they ever would again; that Hutchinson said it would make him more money than he ever made in his life; that he promised to go down and look at the land; that on the 5th or 6th he and Hutchinson went in his car down to Crawford county; that Hutchinson told him he was a friend of his and wanted to see him make more money and not work so hard and that he had been over this land several times and knew every foot of it; that they did not look at the farm that day; that they drove along the west and south side of it; that they did not get out or stop the car; that Hutchinson said he did not want to get wet and that he knew all about it; that they just drove on to Robinson and not finding Merrick and Biles at home returned to Paris; that three or four days later he and Hutchinson went down there again; that on the way down Hutchinson said that he had always been his friend and wanted him to trade them; that he (appellant) proposed to go past the Crawford county farm, but Hutchinson said he didn't have time and that it was not necessary as he knew all about it and to take his word for it and the oil and gas would make him rich as there were two gas wells on it; that he (appellant) told Hutchinson that if he traded for it he would trade for it on Hucthinson's word. Ap pellant testified to many other statements of Hutchinson as to his friendship and as to the great benefit appellant would derive from the trade.

Appellant testified that he met appellee Perisho in front of Hutchinson's shoe shop one day just after he had been down to Robinson and Perisho asked him what he thought about the land and that he told Perisho that

he had never been over it and knew nothing about it only what Hutchinson said and that Perisho said what Mr. Hutchinson said you could rely on and that Hutchinson was a good friend of Hinds and "Wouldn't do him nothing but what was honest; appellant testified that in making the trade he relied upon this statement.

Perisho denies this conversation with appellant and testified that at the time this conversation is alleged to have taken place he was either at Hot Springs, Ark., or on the train on his way there and he is corroborated by several witnesses. This is all the evidence with reference to Perisho's connection with the case. He is not shown to have been interested in the land or in the trade.

July 7, 1915 a contract for the exchange of the land was entered into by R. L. Biles, agent, party of the first part and Hinds and his wife party of the second part and appellant testified that when he signed the contract he

relied upon the representations made to him by Hutchinson.

Appellant testified that after the deed had been delivered, Hutchinson asked him for $250 as commission on the trade and that as he did not have any money he sold him a mule and a typewriter and gave him credit for them on the $250.

Appellant introduced in evidence contracts of later date than July 7th between Hutchinson and the other parties in interest in the trade with reference to financing the trade with appellant and a division of the profits on the trade between Hutchinson and the other parties to the contract and also a written statement showing the amount received by Hutchinson as his share of the profits. Appellant introduced some evidence of statements and admissions of Hutchinson.

Appellee denied the making of any and all the statements and representations claimed to have been made by him; denied having said or done anything to induce appellant to make the trade and denied that he had any connection with the trade except that on the day that it was made he went with appellant at his request to Robinson to examine the abstract of title to the Crawford county land. He also denies asking for commission, denies receiving the mule and typewriter as payment of commissions and says that the mule was bought in May.

Hutchinson is corroborated by the other parties in

interest, who give in detail the negotiations between appellant and themselves leading up to the execution of the contracts and testify that Hutchinson took no part therein except the examination of the abstract and ascertaining the amount of incumbrance on the Crawford county land.

We are of the opinion that the evidence in the case entirely fails to show any liability on the part of appellee, Perisho. If the story told by appellant and his witness be true there is a liability on the part of appellee, Hutchinson. If that told by Hutchinson and his witnesses be true there is no liability on his part. There is a sharp irreconsilable conflict in the testimony in the case and in such case weighing the testimony and determining on which side the truth lies is peculiarly the province of the jury, who saw and heard the witnesses. They evidently gave credence to appellees rather than to appellant and the judge confirmed their verdict, and by reason of the law and the long established rules of practice we would not be justified in disturbing their finding, it not being manifestly against the weight of the evidence.

It is urged as error that appellees attorney on cross examination of the witness Emanuel Hinds, a brother of appellant, after he had answered that he was paying 1-3 of the costs of prosecuting this suit, was allowed to ask him

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how much he was paying. We do not think this was error. One of the elements to be taken into consideration in weighing the testimony of a witness is his interest in the result of the suit, and it is proper on cross examination to ascertain from the witness the fact as to the witnessesi nerest..

Appellee Hutchinson, when testifying as a witness was allowed to give in evidence conversations which he had with the other parties to the contract entered into between him and them with reference to the division of profits resulting from the carrying out of the trade, at the time of entering into such contract, the objection being that it was not in the presence of appellant.

Appellant in his declaration and upon the trial contended that Hutchinson was appellant's agent in this trade and introduced this contract in question as an admission tending to show that Hutchinson had not been true to the trust reposed in him. It was therefore

proper for Hutchinson to explain under what circumstances the profit sharing contract in question was executed. Hutchinson was first asked what the arrangement between the parties was with reference to handling the land in question. This question called for the conclusion of the witness and when objection was made on that and other grounds Hutchinson was then allowed to tell how the contract came to be entered into.

On direct examination Hutchinson was asked the following question by his attorney: "Now Mr. Hutchinson you may state whether or not at any time prior to the buying or trading of this Crawford county land or after the trading of the Crawford county land you represented Mr. Hinds in any capacity?". Appellant objected to the question on the ground that it called for a conclusion. The objection being overruled, the witness answered: "I did not" and the ruling of the court in this regard is assigned as error. The question called for a conclusion of the witness and called for an ultimate and not an evidentiary fact and the objection should have been sustained. No harm could have resulted from this ruling, however, as he had already gone over in detail and denied all acts or alleged conversations tending to show that he represented appellant in any manner in the matter question.

Other questions are raised by appellant as to the reception or exclusion of evidence but we find no reversible error in any of the courts rulings thereon.

The court gave to the jury at the request of the defendants the following instruction: "The court instructs the jury, that if they believe from the evidence that any witness has been successfully impeached on this trial, or that he has wilfully sworn falsely as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire

testimony

except in so far as it has been corroborated by other credible evidence or by facts and circumstances in evidence."

This instruction has repeatedly been held to be bad and its giving in some cases held to be reversible error. In the present case, however, appellant cannot avail himself of this error as the only witnesses whom the record shows were sought to be impeached were witnesses for appellee.

The instructions given to the jury were numerous and lengthy and many objections are raised to the ruling of the court in giving, refusing and modifying instructions, the principal objection being that by different instructions the court instructed the jury before the plaintiff could recover he must prove "that the defendants knew that the statements were false and that the plaintiff did not"; "that the defendant intended thereby to cheat and defraud the plaintiff"; "that the plaintiff relied upon the representations"; "and that he was deceived thereby". Appellant contends that it was not necessary for him to make such proof in order to entitle him to recover.

In order to maintain an action for fraud and deceit the evidence in the case must show:

1. That the representations as charged in the declaration were made by the defendants, or one of them.

2. That the representations were false and known to be false by the defendant making them, and made to deceive the plaintiff, or made as a positive assertion recklessly without any knowledge of its truth.

3. That the plaintiff believed the representations to be true.

4. That the plaintiff making the purchase or entering into the contract relied upon the representations and was induced to make the purchase or enter into the contract because of the same.

5. That the plaintiff has suffered damage thereby.

A representation to constitute the basis of an action for fraud and deceit must not only be false and known to be false by the person making it or made as a positive assertion recklessly without any knowledge as to its truth, but the person to whom it is made must believe it to be true, and rely upon it, and be induced by such reliance to enter into the contract or make the purchase in question. Merwin vs. Arbuckle, 81 Ill. 501; Wachsmith vs Vartini, 154 Ill. 515. A false representation if it is not relied upon by the plaintiff when entering into the contract cannot be the basis of an action for fraud and deceit.

If a person, instead of relying upon the statements made to him, makes a personal investigation and in making the contract relies upon such investigation and not upon the statement an action will not lie even though the statements be false. Billstrom vs. T. T. T. Co.—— Ill. App. (2nd Dist. Oct. 1920, term)

In the present case the declaration alleged that the defendants knew that the representations were false. We are of the opinion that the court did not err in requiring appellant to make the proof specified in the instructions as prerequisite of his right of recovery.

Other objections are made to the ruling of the court upon the instructions. From a careful reading of these instructions while we are of the opinion that some of them are inaccurate and that some of them should not have been given, when they are considered as a whole, taking into consideration their extreme length we are of the opinion that the average jury would not have been misled thereby and that appellant was in no wise prejudiced in the matter of instructions.

When the jury retired to consider their verdict the jurors were allowed to take with them the 4th count of appellant's declaration over appellant's objection. While in some cases it has been held to be error to allow the jury to take with them the declaration over the objection of the defendant, we fail to see how appellant could have been prejudiced by allowing the jury to take with them the count of the declaration which was the written statement of his claim.

Finding no reversible error in the record the judgment is affirmed.

General No. 7335 Agenda No. 48

April Term A. D. 1921

D. N. Wisherd Sons Company, Appellee

vs.

Chicago, Burlington & Quincy Railroad Company, Appellant

Appeal from Circuit Court Adams County.

HEARD, J.

This is a suit brought before a Justice of the Peace by appellee against appellant and taken by appeal to the county court of Adams County where a trial **de novo** resulted in a judgment for appellee against appellant for $195.01 damages and costs of suit from which judgment this appeal has been taken.

Appellee's claim is for damages to three shipments of oysters consigned from different paints in Maryland, with different roads as the initial carrier, which shipments were transported by appellant from Chicago, Ill., its eastern terminus,, to Quincy Ill., in refrigerator cars.

There is evidence tending to show that the oysters were shipped in wooden boxes, each containing five one gallon cans and having space so that the cans could be completely surrounded by ice; that when the first shipment was received in Quincy, there was no ice in the boxes, and that the oysters were soft and almost unfit for human consumption; that when the second and third shipments arrived at Qunicy the oysters were frozen solid and were in a damaged condition; that on each occasion the shipment was at first refused by appellee; that on each occasion after being told by either the local freight agent or claim agent of appellant to take the goods and do the best it could with them and to file a claim for whatever loss was suffered by appellee and that it would be sent in; that appellee thereupon received the oysters, disposed of them, suffered loss to the amount of $195.01 and presented claim to appellant therefor. There is evidence tending to show that the first shipment was delayed in transit four days but there is no evidence as what occasioned the delay or upon what road it occurred. Neither is there any evidence in the case showing where, in transit, the oysters became spoiled for lack of ice or through the negligence of which carrier the first shipment was not properly iced. Neither is there

any evidence as to which carrier had the custody of the other shipments when they became frozen.

Complaint is made as to the action of the court in giving instructions. The first instruction given for appellee has repeatedly been held to be erroneous but under the state of the evidence in this case appellant could not have been prejudiced by it. At the request of appellee the court gave to the Jury an instruction as follows: "The court instructs the jury that while the plaintiff must prove by a preponderance of the evidence that the oysters in question were spoiled or damaged by the negligence of the defendant, such negligence may be shown by the admissions of the authorized agents of the defendant, as well as by actual testimony as to acts of negligence; and if the jury believe that the plaintiff has proven either actual acts of negligence or negligence by admission of the authorized agents of the defendant by a preponderance of the evidence, then the jury should find the issue for the plaintiff and assess its damages at such sum as the plaintiff may be entitled to by a preponderance of the evidence, provided you believe it has been damaged as set forth in these instructions."

This instruction is erroneous in assuming that the evidence showed that there were agents of appellant who were authorized to bind appellant by admissions that appellant was negligent. A further objection to it is that it is not based upon the evidence. There is no evidence that any agents of appellants were authorized to admit negligence on the part of appellant. Neither is there any evidence of any admission of any agent of appellant. A request to appellee to receive the oysters and do the best it could with them coupled with a promise to send in any claim for loss which appellee might sustain falls far short of either an admission of negligence or of liability on the part of appellant.

The court also gave to the jury an instruction as follows: "The court instructs the jury that if you believe from a preponderance of the evidence that an authorized agent of the defendant, authorized so to do, induced plaintiff to accept various shipments of oysters after the plaintiff had refused the same or was in the act of refusing

the same, by representing to the plaintiff that

if the plaintiff accepted the shipment and sustained any loss by reason of their frozen or damaged condition to file a claim for such damage, and the plaintiff relied upon such statements and accepted such shipment, that then the defendant would be liable for any loss on such shipment, and the jury should find a verdict for plaintiff and assess its damages at such sum as appears from a perponderance of the evidence it has sustained."

This instruction directs a verdict and fails to contain all the elements necessary to be proven to entitle appellee to a verdict. What is said as to the instruction last above set forth applies with equal force to this one.

The giving of these instructions was reversible error and the judgment is therefore reversed and the cause remanded.

No. 7338 Agenda No. 51.

April Term A. D. 1921

Mabel Casteel, Appellee,

vs.

Springfield Consolidated Railway Company, Appellants

Appeal from Sangamon.

223 I.A. 656

HEARD, J.

This is a suit to recover for personal injuries sustained by the appellee July 26, 1918, while a passenger on a car of the appellant. There are three counts in the declaration to which the plea of general issue was filed.

All of these counts aver the relation of carrier and passenger; it is averred that there was a certain raised and oval shield in the passageway between the seats of an open car and that the same had become so smooth that a person stepping on the same in getting off said car would slip; the third or additional count averred that the said shield was in such smooth, uncovered and unprotected condition that the same would cause any passenger stepping thereon to slip and fall; all of the counts averred that while the appellee was walking in such passageway between the seats to the place of exit for the purpose of alighting from said car, that she stepped upon the said shield, and on account of its smooth condition, slipped thereon and was thrown from the said car and injured.

Upon a trial the court instructed the jury to find appellant not guilty. The jury rendered a verdict in accordance with the instruction, upon which verdict judgment was rendered in favor of appellant against appellee. Appellee appealed to this court. The judgment was reversed and the cause remanded for another trial. Castell vs. S. C. Ry. Co., Ill. App.

A second trial of the case resulted in a judgment in favor of appellee against appellant for $521 damages and costs, from which judgment appellant has appealed.

It is claimed by appellant that the court erred in refusing to instruct the jury to find the defendant not guilty.

Upon the former appeal in this case this court held that

the testimony in the case fairly tended to support the allegations of the declaration and that the

court erred in instructing the jury to find the defendant not guilty. The evidence in the second trial being practically the same as on the first that holding must be adhered to by us and and we must hold that the court did not err in refusing to instruct the jury to find for the defendant.

It is claimed by appellant that there was no evidence of the exercise of due care on the part of appellee, who testified that as she was walking to the side of the car to alight, she reached for the upright post of the car and that she was looking at the post when she stepped upon the shield and found it slick and slipped upon it. Whether or not appellee was in the exercise of ordinary care for her own safety was a question of fact for the jury. There was some evidence tending to support their findings in that regard and we would not be justified by the evidence in this case in invading their preculiar province and setting aside their finding.

It is claimed by appellant that there is no evidence of negligence on the part of appellant.

The charge of negligence in the declaration was that the shield in question was in a smooth, uncovered condition, and that the same would cause any passenger stepping thereon to slip and fall.

Appellant introduced evidence to the effect that the shield housing and equipment in question was in common use throughout the country, that it had been in general use for twenty-five years and that it was a recognized and approved type of equipment.

While a carrier of passengers for hire is not an insure of their safety and liability does not arise from the mere happening of an accident, yet such carrier is held to the exercise of the highest degree of care consistent with the pactical operation of the road and the mode of conveyance adopted. Where the evidence shows that such carrier allows its equipment to be and remain in such condition that any person stepping thereon would slip and fall we cannot say that a jury would not be justified in finding such carrier thereby guilty of negligence even though such equipment was recognized as standard equipment and was in common and general use throughout the country. I. C. R. vs. O'Connell, 160 Ill. 636.

The jury by their verdict found appellant guilty of the negligence charged in the declaration and we are of the opinion that the evidence in the case was sufficient to warrant their finding.

The judgment is affirmed.

General No. 7343 Agenda No. 63

April Term, A. D. 1921

C. C. Drake, Administrator of Ralph Drake, Deceased, Appellee

vs.

John S. Nixon, Appellant

Appeal from Circuit Court Tazewell County

HEARD, J.

This is an action on the case brought by appellee against appellant to recover the pecuniary damages sustained by the next of kin of Ralph Drake, a boy 6½ years of age, by reason of his death, caused, it is alleged, by reason of appellant's negligence.

The declaration consisted of an original count and two additional counts, the original and second additional counts being what are known as speed counts. The first additional count alleged negligence in failing to give warning of the approach of appellants automobile. Each of the counts alleged that by reason of such negligence appellee intestate, Ralph Drake, while in the exercise of due care, was run over by appellants automobile causing the death of said Ralph Drake. To these counts of the declaration the defendant filed a plea of the general issue. A trial resulted in a verdict in favor of appellee for $3,000, upon which verdict judgment was rendered and an appeal taken therefrom to this court.

October 17, 1917, just about 12 o'c'ock, noon, appellant, accompanied by a daughter, 31 years of age, was driving a seven passenger, 6 cylinder Buick car, weighing from 3500 to 3900 pounds, south through the Village of Goodfield, a place of about 100 inhabitants, upon a public highway. Arriving at the intersection of this highway with one going west, Appellant turned west. After going west about 125 feet the front left wheel of his car ran over Ralph Drake, injuring him so that he died a few minutes later.

Ralph Drake had that day been attending a school which was situated at the south east corner of the intersection of the two roads mentioned. When school closed at the noon hour he and several other children traveled west toward their respecitve homes on the highway, which was an ordinary country road of the width of about 60 feet with a traveled track between the weeds or grass upon the sides, estimated to be between 18 and

25 feet in width. This road was practically level, but drained to the east. The children were walking together in the traveled road, it being the only place for pedestrians. The oldest child observed the Nixon car coming and said "Here comes a car." Thereupon the children scattered, most of them going to the south, but some went to the north of the traveled road. Ralph Drake, the undisputed testimony shows, started towards the

north of the road, some witnesses saying he got as far as the grass. Hen than turned and ran diagonally toward the south side. He stumbled and fell in the roadway and the left front wheel of the car ran over him. Miss Nixon picked him up and carried him to his home, which was nearby, while appellee went to the nearest home to call a doctor. The doctor arrived too late to be of any avail and Ralph Drake died 15 or 20 minutes after the injury.

There was no evidence of the giving of any signal of the cars approach. Some of the witnesses testify they heard no warning. The evidence conclusively shows, however, that deceased had timely warning from Mrs. Nellie Blaine, the eldest of the children, of the cars approach.

The only witness interrogated by appellee as to the speed fo the car prior to the accident was the witness, Nellie Blaine, who testified that when she first saw the car it was going south on the north and south road; that she thought that just before it reached the corner the car was going about 20 miles per hour, maybe a little less; that after he turned the corner and came west he slowed down and as it came up to the crowd it was not going over five or ten miles per hour.

The only other evidence offered by appellee in his case in chief, was the testimony as to skid marks from the place where the car stood after the accident running back a distance variously estimated by the witnesses in the case at from three to fifteen feet. The road had been oiled the year before. It was hard and dry, but not dusty. There is no evidence in the case as to what the driver of the car did at the immediate time of the accident with reference to stopping the car. He was not a competent witness and his daughter who was the only other occupant of the car testified that when she saw deceased start to run back across the road she stood up in the car and screamed, centering all her attention on

the boy and paying no attention to her father or the car.

Neither party introduced evidence tending to show and relation between a skid mark from 3 to 15 feet behind a car and any given rate or rates of speed and this court can not take judicial knowledge of the rate of speed at which the car must have been going to have produced the skid marks in question. Fannon vs. Morton, Ill. App. (2nd Dist. Oct. 1920 term.)

Appellant contends that this case should be reversed by reason of the improper conduct and remarks of counsel for appellee used during the argument of the case and instances of such improper remarks too numerous to specify in detail are called to our attention. In fact the argument of appellee's counsel to the jury, which is set forth in the record, instead of being an appeal to the reason and unbiased judgment of the jury sitting as a tribunal to impartially consider the evidence and do exact justice between the parties, was an inflammatory appeal,,

calculated to arouse the prejudice, sympathy and passion of the jurors and divert their minds from the questions which were really before them for decision.

While it is true that the trial court sustained objections to several of the remarks of counsel and instructed the jury to disregard the same, yet the rule is that although the trial court may have done its full duty in its supervision of the trial and in sustaining objections, a new trial should be granted when it appears that the abuse of argument has worked an injustice to one of the parties. C. U. T. Co. vs. Lauth, 216 Ill. 176; Bale vs C. J. R. Co| 259 Ill. 476; Bromley vs. Peoria Ry. Co. 217 Ill. App. 661; Eshelman vs. Rawalt, 131 N. E. 675, 293 Ill. 192.

The facts in the present case were such as to require its fair, impartial and dispassionate consideration by the jury. The following language from Bishop vs C. J. Ry. Co.. 289 Ill. 63 is so peculiarly appropriate to this case that we adopt it as our own: "While it is true at times, in closely contested cases, counsel may inadvertently say that which is prejudicial, the influence of such a statement may generally be overcome by sustaining objections thereto and by retraction on the part of offending counsel made in good faith, yet where it would appear, as it does here by frequent instances, that counsel has

in the presence of the jury indulged in acts and statements prejudicial to the rights of the opposite party, and which tend to indicate that he was seeking what might be gained from such prejudice of the jury, such misconduct will amount to a mistrial of the cause, unless it can be seen that it did not result in injury to the plaintiff in error. We cannot so hold here.******While it is unfortunate that this case must be reversed for these reasons, yet it is a misfortune visited upon defendant in error by his own attorney. When intelligent counsel persist in conduct which he knows may result in setting aside the verdict of the jury if he secures one, he is thereby deliberately taking chances with his client's rights******While it is regretable that this case must be reversed because of improper conduct of intelligent and able counsel, yet if courts of law are to be sources of justice, the rule that parties litigant, regardless of who they may be, shall have secured to them the opportunity to have the issues of their case tried by a jury free from the prejudicial influence of improper conduct of counsel must be strictly enforced".

The judgment will be reversed and the cause remanded.

Niehaus, J. took no part.

Gen. No. 7346 Agenda 57.

April Term A. D. 1921

Floyd J. Hutson, Defendant in Error,

vs.

John Barton Payne, Operating the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Plaintiff in Error.

Appeal from Circuit Court Coles County.

223 I.A. 656

HEARD, J.

This is an action on the case brought by defendant in error hereinafter called Plaintiff against Plaintiff in error, hereinafter called defendant, to recover damages for personal injuries resulting from a collision between an engine drawing a passenger train of the C. C. C. & St. L. R. R., while the same was under the management of the Director General of Railroads, and an automobile truck driven by Plaintiff. The collision occurred at a point where the tracks of said Railroad cross Third Street in the city of Charleston.

The declaration in the case consisted of four counts of which it is only necessary to mention two; the second which charges negligence in failing to sound a whistle or ring a bell, as required by the statutes, and the third which was based upon an alleged violation of a city ordinance of the city of Charleston which provided that no passenger train should run within the corporate limits of said city at a greater rate of speed than ten miles per hour.

A trial in the circuit court resulted in a verdict for plaintiff against defendant for $1500 damages upon which verdict judgment was rendered, to review which judgment defendant sued out a writ of error from this court.

It is claimed by defendant that Plaintiff failed to prove that plaintiff's injury was the result of any negligence on the part of the defendant charged in the declaration, while several witnesses testify that a whistle was sounded and bell rang on the train in question, other witnesses, within hearing distance at the time of the accident, testified that they did not hear a bell ring or whistle sounded. The evidence showed that the train at the time of the accident was being operated at a rate of speed which was in violation of the ordinance. While a violation of a statute or ordinance which does

not contribute to bring

about the injury cannot be made the basis of a recovery, yet, when such violation is the proximate cause or one of the causes without which the injury would not have occurred, such violation will render the violator liable to the injured party if he be free from contributory negligence. Whether or not such violation was the proximate cause of the injury was a question of fact for the Jury which the trial court properly submitted to the Jury.

It is contended by defendant that the evidence failed to prove that plaintiff exercised due care for his own safety. The defendant's railway passes through the city of Charleston in an easterly and westerly direction. Third Street, the street herein involved, comes from the south and is paved up to the southern limit of the defendant's right of way. There are four tracks running over this crossing, the south one is the main line track; eight feet to the north of the main track there is a passing track; eight feet further to the north there is a house track which runs to the freight depot which is located two hundred and fifty feet to the east of Third Street crossing. At the platform of the freight depot there were four or five box cars which had been pushed in there by the switch engine which was then working in that vicinity. Fifty feet to the north of the north rail of the main track there is an elevator track, and to the north of the elevator track there are several buildings including a grain elevator, Standard Oil Plant, coal sheds and stock yards, all of which are located on the defendant's right of way. The plaintiff was in the oil business and just prior to the accident he had been to the oil plant to have his truck filled with oil, after which he started south over the Third street crossing. When he reached the elevator tracks there was a switch engine switching cars on that track. He stopped and waited for it to back east, then he drove his truck on over the house track and passing track to the main track, where the accident occurred.

The law is well settled that the evidence must show affirmatively that the plaintiff exercised due care for his own safety and that liability cannot rest upon imagination, speculation or conjecture, but must be based upon facts established by evidence fairly tending to prove

them. Peterson vs. Indus. Com. 281 Ill. 326; W. S. Co. vs. Indus. Comm. 288, Ill. 206: U. D. Co. vs. Indus. Com. 295, Ill. 111; Royster vs. Murdock Ill. App. 2nd Dist. Oct. 1920 term.

The law however does not specify what particular thing a man must do to be in the exercise of ordinary care for his own saftey. "Due care and caution" is a relative term and what is required to constitute such care depends upon all the conditions and circumstances surrounding the person at the time he is called upon to act. If he does some act or uses some faculty tending toward his self preservation, whether, under all the facts and circumstances shown by the evidence he was in the exercise of ordinary care for his own safety is a question of fact for the Jury. Rosenthal vs. C. & A. R. R. Co. 255, Ill. 552.

In the present case there is evidence that just as plaintiff came across the elevator track and was 50 feet from the main track, he looked east and did not see the train. There is also evidence that between that point and the point of the collision he stopped again or slowed up.

Taking into consideration all the conditions surrounding Plaintiff as he approached the point of collision, the number of tracks, the fact that there were cars on three of the tracks, the fact that driving a truck requires some care, the fact that there was other traffic on the street and the fact that he had a right to presume that defendant would not run the cars at a rate of speed prohibited by ordinance, we are of the opinion that the court very properly submitted the question of Plaintiff's exercise of due care to the Jury. The decision of questions of fact being the peculiar province of the Jury, we would not be justified in setting aside their finding under the evidence in this case.

Complaint is made of the giving of plaintiff's instruction upon the subject of the preponderance of evidence. While this instruction contains some defects, we are of the opinion that when all the instructions given upon this subject are considered together, the Jury could not have been in any way misled upon this subject. Finding no reversible error in the record, the judgment is affirmed.

General No. 7361 Agenda No. 12

October Term, 1921.

James Flory, Appellee

vs.

Eugene Bland, Appellant

Appeal from the Circuit Court of Shelby County.

HEARD, J.

223 I.A. 657

Appellee brought this suit against appellant in Justice Court and it was taken by appeal to the Circuit Court where upon a trial before the Court without a Jury, a Judgment was rendered in favor of appellee against appellant for $138.90 and three fourths of the costs from which Judgment this appeal had been taken.

Appellee's claim is for services performed in boring two holes for wells, in which no water was found and cleaning out an old well for which latter service a claim of nine dollars was made.

Both parties agree that the first well was bored under a special contract, the only difference between them being as to the price to be paid, appellee claiming that it was $1.00 per foot to hard pan and $1.50 per foot through hard pan and appellant claiming that the price through out was to be $1.00 per foot in case water was obtained and 50c per foot in case water was not obtained. No water was obtained and the second hole was dug. The evidence is somewhat conflicting as to what the arrangement was under which the second hole was dug but both parties testify that prior to commencing to bore the second hole appellee told appellant with reference to the cost thereof "I will treat you right in this next hole."

There was testimony in the case that at the

time of doing the work, the usual and customary price for boring wells like the ones in question ranged from 50 cents to $1.25 a foot and for a dry hole 50 cents to $1.00 according to contract.

The first hole was bored 54 feet to hard pan and 5 feet in hard pan and the second hole was 54 feet to hard pan and 31 feet in hard pan.

The contention of appellant is that under the evidence there were but two Judgments possible, either $171, for appellee, or $81, for appellee, and that therefore, there is on basis in the evidence for the Judgments

of $138.90 rendered by the Court.

With this contention we can not agree. There was evidence upon which the court could find that the rate for boring the first hole was fixed by special contract and that the rate was not so fixed as to the second hole, but that it was bored under an arrangement whereby appellee was to treat appellant right as to the cost of boring it, in which event, appellant would be liable to pay appellee the usual, reasonable and customary price therefor, in that neighborhood, at that time for doing such work.

If the court so found, and the amount allowed would indicate that he did so find, the amount for which Judgment was rendered, $138.90 falls within the range of the evidence and has a basis in the evidence.

We, would therefore, not be justified in disturbing the courts findings and the Judgment is affirmed.

Filed Oct 22-1921

21085

General No. 7363 Agenda No. 63

October Term, 1921

John Victor Jockisch, Rose Armeda Henning, Elizabeth C. Brines, Complainants, Appellants

vs.

Rudolph Clifford Jockisch, The First State Bank of Beardstown, Illinois, a corporation, The First National Bank of Beardstown, Illinois, a corporation, Defendants, Appellees.

Appeal from Cass. 223 I.A. 657

HEARD, J.

May 26, 1920, appellants filed their bill in chancery in the circuit court of Cass County, alleging that William Jockisch, the father of appellants and of appellees, Rudolph Clifford Jockisch, died in the year 1905, intestate, leaving him surviving a widow, Elizabeth Jockisch, and two sons and two daughters, being appellant, John Victor, and appellee, Rudolph Clifford, his sons, and appellants Elizabeth C. Brines and Rosa Armeda Henning, his daughters, as his only heirs at law.

The bill further alleges that at the time of the death of William Jockisch he was the owner of fifteen shares of the capital stock of the First State Bank, Beardstown, Illinois, and fifteen shares of the capital stock of the First National Bank of Beardstown, Illinois; that while upon his deathbed he called his children and his widow to him and requested that upon his death the dividends arising from the said shares of capital stock of said named banks, be given to the said Elizabeth Jockisch, for her use and benefit for the period of her life and that at her death the same should be divided equally among his four children and that he desired the farming lands he owned, consisting of about one hundred and twenty acres, be purchased by one of his sons, so that the title to the same would continue in the Jockisch name; that such land he considered as being worth $125 an acre; and

that he desired one of his sons, either appellant, John Victor, or appellee, Rudolph Clifford, to purchase such land at that figure; the proceeds of the sale to be divided among his heirs.

That he desired the title to the homestead in which he and his wife then resided to be conveyed to the said Elizabeth Jockisch by the heirs, requesting that in the

event the said Elizabeth Jockisch found the homestead too large for her purposes, that she be permitted to sell the same and repurchase a smaller residence.

The bill further charges that during the period of by the father was never reduced to writing, but that subsequent to his death and on or about the 30th of October, 1905, upon the request of the widow, John Victor Jockisch was appointed administrator of the father's estate and that he duly qualified as such; that the estate of William Jockisch was duly administered upon and the administrator filed his final report and was discharged by order of the County Court of Cass County, Illinois, on the 6th day of December, 1906.

The bill further charges that during thep eriod of administration upon the estate of William Jockisch, no attempt was made to establish the verbal request of William Jockisch, relative to the division of his estate, as a nuncupative will, but that the children and widow of said William Jockisch sought to carry out the dying request of their father and entered into an agreement among themselves, providing that the land and personal property, including the shares of bank stock belonging to said estate, should be divided agreeable to the wishes of the father; that in pursuance to such agreement so made among the heirs of William Jockisch the farming lands of which William Jockisch died seized, were purchased by appellant, John Victor Jockisch at the said price of $125 an acre, and that a deed was delivered to him by the remaining heirs in which the said Elizabeth Jockisch joined, conveying the title to such lands to him; that a deed was made by the heirs conveying the title to the homestead to the widow, and that the thirty shares of bank stock of said mentioned banks were, in pursuance to such agreement, assigned to the widow by appellant, John Victor Jockisch, acting as administrator of the estate

of William Jockisch, deceased; but that such assignment was made with the understanding and agreement among the heirs that such stock should be held by her, the said Elizabeth Jockisch, only for her life that thereafter Elizabeth Jockisch continued to live in Beardstown until her death on the 13th day of February, 1920; that from the time of the death of William Jockisch, appellee, Rudolph Clifford Jockisch, assumed to act for the said Elizabeth Jockisch as her confidential agent in all

matters relating to her business affairs, and that for all that time and until her death, appellee, Rudolph Clifford, was, in fact, her confidential advisor, and that due to the confidential relation existing between her and the said appellee, Rudolph Clifford, the said Elizabeth Jockisch reposed great trust and confidence in such appellee and relied upon him to manage and control her business affairs; that prior to the month of January, 1920, Elizabeth Jockisch acquired by purchase twelve additional shares of the capital stock of the First National Bank of Beardstown.

The bill further charges that Elizabeth Jockisch departed this life at Beardstown, on the 13th day of February, 1920, at the age of eighty-one years; that for more than two years before that time she had been afflicted with the diseases incident to old age; that some time before her death she had developed carcinoma of the liver and due to such cancerous growth, had been for many years before her death in great pain and agony; that in addition to that trouble, she suffered from arteriosclerosis and a diseased condition of her kidneys, and that on the 6th day of January, 1920, she had become weakened and impaired in mind as well as body and that at least for one year before her death she was wholly incapable of transacting business intelligently, or protecting her own interests; and that during all of that period of time she relied upon the advice and counsel of appellee, Rudolph Clifford Jockisch.

The bill further alleges that appellee, Rudolph Clifford, was fully aware of the condition of said Elizabeth Jockisch, and knew that

she was not capable of intelligently transacting business or protecting her own interests in any business transaction; but that notwithstanding this knowledge he took advantage of the confidential relation existing between them and of her impaired condition of body and mind and procured her to make an assignment to him of all of said shares of capital stock of said banking institutions.

The bill further alleges that at the time of such procured assignment on the 6th day of January, 1920, the said Elizabeth Jockisch was of unsound mind and not capable of transacting the business then in hand; that at such time she was dominated by appellee, Rudolph Clifford Jockisch, who obtained title to said bank

stock at a time when the said Elizabeth Jockisch was under his undue influence and restraint, and that in equity and good conscience the said assignments of such stock by Elizabeth Jockisch to him, are wholly void and without legal effect, and that in view of the agreement entered into by appellants, and appellee, relative to the disposition of their father's estate, the assignments procured by said appellee, constitute a fraud upon the rights of appellants as heirs at law of William Jockisch and Elizabeth Jockisch, deceased and that such assignments were wholly without consideration passing from appellee to the said Elizabeth Jockisch.

The original bill prays that appellee, Rudolph Clifford, be required to reassign said stock to the estate of Elizabeth Jockisch or to pay appellants and each of them such sums as shall represent the fair, cash market value of said stock, together with interest and accrued interest and dividends.

Appellee Rudloph C. Jockisch filed his answer denying the trust agreement among the heirs of William Jockisch set up in the bill; denying that at the time of making the assignment of the stock, Elizabeth Jockisch was of unsound mind; denying the fiduciary relation set up in the bill and denying that the assignment of the stock was procured by undue influence.

After a hearing in open court the chancellor dismissed the bill for want of equity.

Appellants introduced evidence tending to show the making of the agreement between the heirs and widow of William Jockisch set up in the bill while appellee introduced evidence tending to show that such agreement had not been made. No good purpose would be subserved by discussing this evidence in detail in this opinion. While the greater number of witnesses testified in favor of appellant's contention in this regard the court who saw and heard the witnesses found that such agreement had not been made and from the record in the case we cannot say that he was clearly wrong in such finding and therefore we would not be justified in disturbing it.

It is claimed by appellants that Rudolph Jockisch was not competent to testify as a witness upon this subject. Appellants as to this contention were not claiming as heirs of Elizabeth Jockisch, but as heirs of William Jockisch and Rudolph was a competent witness upon

this portion of the case.

It is claimed by appellants that Elizabeth Jockisch was not of sound mind and memory at the time of executing the assignment in question. Two of the complainants, the husband of one of the complainants, two daughters of complainants and their husbands and the son of one of the complainants gave testimony tending to show that in 1916, there was first noticeable a change in her mental condition and that thereafter up to the time of her death she was subject to lapses of memory, delusions and hallucinations and gave it as their opinion that she was not of sound mind and memory. Two medical experts who had no acquaintance with Elizabeth Jockisch, in reply to a hypothetical question embodying the alleged facts stated by these witnesses gave it as their opinion that she was not of sound mind. This testimony was more than counter-balanced by the testimony of many disinterested witnesses, among whom were merchants, deliverymen, next door neighbor, women visitors, her attending physician, a physician called in consultation, the witness to the assignment and the notary public

who took her acknowledgment to it, who all gave testimony tending to prove that she was of sound mind.

In McAweal v. Hillison, 291 Ill. 319, it was said: "Impairment of the faculties by disease or old age will not invalidate a deed, if the party executing it has sufficient mental capacity to understand his acts. It must be shown that the grantor, did not have sufficient mind and memory to comprehend the nature and character of the transaction. Mental weakness that does not amount to inability to comprehend and understand the nature and effect of the transaction, is not sufficient to invalidate a deed. The burden was on appellees to prove the allegations of their bill. (Willemin vs. Dunn, 93 Ill. 511; Kimball vs. Cutty, 117 Ill. 213; Sears vs. Vaughn, 230 Ill. 572; Dalbey vs. Hayes, 267 Ill. 521.)"

In our opinion the finding of the court upon the question of mental capacity is not only not unwarranted, but it the only finding warranted by the evidence in the case.

It is claimed by appellants that a fiduciary relation existed between appellee, Rudolph Jockisch, and his mother; that proof of such relation establishes prima facia the charge that the execution of the assignment

was the result of undue influence and that appellee has failed to overcome this prima facie case by proof.

The evidence shows that appellee Rudolph Jockisch transacted some of his mothers business for her; that she instructed the bank to honor checks drawn by him against her account and that for the purpose of paying some of her bills she gave him bank checks, signed by her in blank, but in the view which we take of this case, it is immaterial whether a fiduciary relation existed or not. The mere fact of a fiduciary relation existing at the time of the assignment would not of itself render the assignment void. It would only shift the burden of proof upon appellee to show that the transaction was not the result of wrongful or undue influence, but was the free and voluntary act of the assignor.

In Volbert v. Volbert, 282 Ill. 415, the court said:

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"Counsel argued that a fiduciary relation existed between the defendant in error, Jay Valbert and his father and that therefore the deed was prima facie void. Conceding for the purpose of this case, that such a relation did not exist between the son and the father, the execution of deeds under such circumstances will be held valid if it appears it was entered into with full knowledge of the nature and effect of the deeds and resulted from the deliberate, voluntary and intelligent desire of both and not through influence engendered by their relationship."

Adolph E. Schmoldt, vice president of the First National Bank of Beardstown, who is also a lumber and coal dealer for whom Rudolph Jockisch worked testified that on Jan. 6, 1920, he called at the residence of Elizabeth Jockisch for the purpose of taking Rudolph in his car to his work, as he frequently did; that Rudolph asked him to come into the house; that he went in and found Elizabeth Jockisch there; that Rudolph left the room and went down stairs to attend to the furnace; that after speaking about her health and ordinary greetings she said that for a long time she had been wanting to transfer her bank stock to Rudolph and had now fully made up her mind to do so and asked him to witness the transfer; that she then got the shares of stock; that he filled in some blanks and she signed the assignments in question; that he witnessed it; that she said that she would like to have a notary public acknowledge it and asked him if he would have one come up; that he told

her that as soon as he got to the office he would call Judge Dietrich; that she said she would be much obliged if he would do so; that he talked with her probably 30 to 40 minutes; that Rudolph was not in the room with them at any time while they were taking about the assignments; that when he went to his office he called up Judge Dietrich and asked him to go up to take the acknowledgement; that in his opinion she was of sound mind at that time.

W. H. Dietrich, a lawyer and notary public, who had been county judge

of Schuyler county four years and member of the legislature two terms testified that prior to or since Jan. 6, 1920, he had never represented Rudolph Jockisch; that on that date Schmoldt told him Mrs. Jockisch wanted him to take an acknowledgement of a transfer of some bank stock; that that evening he saw Rudolph out near his garage and went over to him and Rudolph went with him over to his mothers; that Mrs. Jockisch invited him into the front parlor; that he said he understood she wanted to see him and she told him she wanted him to take an acknowledgement of some bank stock she was transferring to Rudolph and wanted him to look over the paper and see if it was done legally; that she produced the bank stock on which the assignment had been filled in and signed; that he told her it looked as if it was legal; that he told her he did not understand that it was necessary to give acknowledgement of bank stock, but that it would not hurt anything; that she said to acknowledge it; that he went through the formality of asking if that was her signature and if she understood that by signing it she was changing the ownership of it and explained as best he could the effect of the assignment and that she said she understood; that he told her he did not have his seal with him and would take it with him to attach the acknowledgement to it; that she told him to do so; that he asked her what to do with it after that and that she told him to turn it over to Rudolph; that he took the assignment with him to his office filled in the acknowledgement and thereafter turned it over to Rudolph; that he was in Mrs. Jockisch's presence about 15 minutes and during that time Rudolph was in another part of the house talking with some woman who

was there; that in his opinion she was of sound mind at the time.

After a careful consideration of all the evidence in the case we are of the opinion that whether or not a fiduciary relation existed between Rudolph Jockisch and his mother the Chancellor was fully justified in finding that the assignments in question were made freely and voluntarily and not as the result of any undue or wrongful

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influence.

The decree of the circuit court is affirmed.

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General No. 7387 Agenda No. 42

October Term, A. D. 1921.

Charles M. Ferre, Appellee

vs.

Laban Yoder, Appellant

Appeal from Circuit Court of Macon County.

HEARD, J.

This is a suit brought to recover damages claimed to have been sustained by appellee by reason of alleged negligence on the part of the Appellant in causing an automobile driven by appellant to collide with a truck on which appellee was riding.

The trial in the Circuit Court resulted in a judgment for $1500.00 damages, from which judgment this appeal was taken.

Appellee was an employee of the Meredith Furniture & Storage Company of Decatur, and on the 27th day of December, 1919, at the time of the accident was riding in the rear of a truck of said company driven by another employee of said company.

At the intersection of DECATUR street with South Fairview Avenue in said city, the truck upon which appellee was riding while going east, was struck by a five-passenger touring car driven by appellant going north.

At the time of the accident appellee was riding on the open part of the body of the truck for the purpose of watching a piano which was being moved on said truck. Appellee testifies that he was on the south side of the piano and that before the truck started across the street he looked south and saw appellant's car about 175 or 178 feet south of the crossing coming at the rate of 20—25 miles per hour but that he had no way of warning the driver of his truck as the driver was in the closed cab of the truck.

Complaint is made that the court refused to give the jury

the following instruction:

"If you believe from the evidence in this case that the plaintiff, by using his faculties with ordinary and reasonable care in looking out for danger, could have avoided the injury in the case in question, and that he negligently failed to do so, and thereby contributed to the injury, if you believe he was injured, then he cannot

recover in this case."

While the jury were told in other instructions that appellee could not recover if he was guilty of negligence which contributed to bring about the injury, the principle contained in the refused instruction was not covered by any given instruction. The refusal of this instruction was reversible error. C. C. Ry. Co. v. O'Donnell, 208 Ill. 267; Flynn v. C. C. Ry. Co. 250 Ill. 460.

Complaint is made of the giving of appellee's fourth instruction. This instruction is apparently based upon language used in Nonn v. C. C. Ry. Co. 232 Ill. 378, but we think it subject to some criticism, as not being in strict compliance with the rules laid down in Pienta v. C. C. Ry. Co. 284 Ill. 246 and Opp. vs. Pryor, 294 Ill. 538.

For the error in refusing to give the requested instruction the judgment is reversed and the cause remanded.

Rehg 2109 Filed Oct 25-1921

General No. 7402 Agenda No. 45.

October Term, 1921

George W. Shutt, Appellee,

vs.

Chicago, Wilmington & Franklin Coal Company, a Corporation, Appellant.

Appeal from Sangamon.

223 I.A. 657

HEARD, J.

This is a suit brought by appellee against appellant to recover damages because of the alleged subsidence of about four acres of appellee's land caused, it is alleged in the declaration by reason of appellant's negligent failure in conducting its mining operations and removing the coal from under appellee's land, to leave adequate and sufficient support thereunder. A trial in the circuit court resulted in a judgment for $2200 damages in favor of appellee, from which judgment this appeal has been taken.

Upon the trial certain witnesses who gave opinions as to the value of the land after the subsidence stated that they had taken into consideration the fear of future sinking of the land. Appellant moved to strike out all of the testimony of the witness on the ground that no damage can be recovered in a subsidence case except for a subsidence that has actually occurred. The court denied the motion, but stated "the jury will disregard the witness testimony as to damages so far as it is based upon the possibility of the future" and later gave to the jury a written instruction to the same effect. Appellant's motion being to strike out all the testimony of the witness, it was properly denied as the witness had given much testimony which was competent.

Appellant contends that appellee should have been limited to damages to the land subsided and not extended to the forty acres in which it was situated. There is no question that in assessing damages the inquiry is limited to the tract of land immediately

affected. When, however, in a subsidence case, the sunken land is a part of a tract with which it has been used for farming or other purposes if the use of the whole tract has been affected by the subsidence of the part then damages to the

entire tract can be shown.

There was considerable conflict in the testimony as to the amount of damages and as to what should be considered in estimating the damages. This state of the record required that the jury should be accurately instructed. The court at the request of appellee gave to the jury an instruction which contained the following language: "And you are further instructed that in determining the fair cash market value of the plaintiff's land at any given time, you have the right and you should take into consideration all the facts and circumstances existing at such time, as shown by the evidence, and which, in your judgment, would have a material bearing in determining the amount for which said property would sell at such time, in so far as the same are disclosed by the evidence."

This instruction left it to the jury to determine in their judgment what evidence would have a material bearing in determining the amount for which the property would sell. Whether evidence is material is a question of law for the court and it is error to submit it to the jury. When the jury is left to decide what evidence is material or has a material bearing they might find material evidence to be immaterial or immaterial evidence material. Baker & Reddick v. Summers, 201 Ill. 52; Kreiger V. A. E. & C. R. R. Co., 242 Ill. 544; Laughlin v. Hopkinson, 292 Ill. 80.

In the condition of the record in this case we consider the giving of this instruction reversible error

The judgment will be reversed and the cause remanded.

Filed Oct 25- 1921

Rec'd

109(C)

General No. 7408 Agenda No. 66

October Term, 1921

George Mochel, Appellant,

vs.

George Rice, Appellee.

Appeal from City Court of City of Pana.

HEARD, J.

223 I.A. 658

July 16, 1918, appellant being the proprietor of the Silver Moon cafe, a restaurant and bakery, in Pana by a written instrument made a conditional sale to L. A. Shoupe and R. T. Clark of all the stock in trade and everything upon the premises used in connection with the business. The instrument contained the following among other provisions: "It is further agreed that if the purchaser shall not have paid the remaining fifteen hundred ($1500.00) dollars by the 16th of July, 1919, or shall have an execution levied on his goods, or suffer any act which may prejudice the vendor's rights, or fail to observe the stipulations herein contained, the vendor may resume possession of the above-described implements, furniture, fixtures, etc., and for that purpose may enter the premises occupied by the purchaser.

It is further expressly understood and agreed that title to each and all of the above chattles shall remain in George G. Mochel, the vendor, and that he shall remain absolute owner of same until the final payment shall be paid."

About August 21, Clark withdrew from the partnership and was released from the contract by the consent of appellant and a new contract was entered into between appellant and L. A. Shoupe, and dated back to the date of the origional contract with Clark and Shoupe, but it in all respects strictly conformed to the origional contract between appellant and Clark and Shoupe as to terms, wording, times of payment, conditions for forfeiture, title, etc. From then on, until September 11, 1918, L. A. Shoupe continued to operate and conduct the business.

September 11, 1918, Shoupe without the knowledge or consent of appellant transferred his interest to appellee by an instrument containing provisions similar to those above quoted, appellee having full knowledge of appellant's rights and interest in the premises. Appellee took possession of the property.

September 17, 1918, appellant learning of the sale from Shoupe to appellee made a written demand upon appellee for the fixtures, implements, etc. Appellee refused to deliver possession and appellant thereupon brought suit in replevin. A trial in the city court of the City of Pana resulted in a judgment for appellee against appellant for a return of the property and $500 damages from which judgment this appeal was taken.

Upon the trial of the cause the court allowed appellee over the objection of appellant to give in evidence the amount of receipts and profits from the business during the six days it was conducted by appellee. This was error. The measure of damages in replevin is the value of the use of the property during its detention. Speculative or expected profits cannot be recovered. Green vs Mann, 11 Ill. 613; Butler vs Mehrling, 15 Ill. 488; Alley vs McCabe, 147 Ill. 410.

For the error in the admission of evidence the judgment is reversed and the cause remanded.

General No. 7281 Agenda No. 5

April Term A. D. 1921

Duncan Bros., Appellees

vs.

J. H. Donaldson, et al, Appellants

Appeal from Macon.

223 I.A. 658

NIEHAUS, J.

The appellees, Jeremiah and A. C. Duncan, composing the firm of Duncan Bros., entered into a written contract with Rankin Whitham Co. on December 12, 1918, for the purchase of 386 acres of land in Sheridan county, Mo. As a part of the consideration for this land, Rankin Whitham Co. agreed to take from Duncan Bros., certain property at Lintner, Illinois, and a stock of merchandise, which was to be invoiced at cost under the terms of the contract. Contemporaneously with the agreement referred to, Rankin Whitham Co. also entered into contract with the appellant, J. H. Donaldson, who had acted as agent in bringing about the sale of the Sheridan county land to Duncan Bros.; and by the latter contract the appellant Donaldson agreed to carry into effect that part of Rankin Whitham Co. contract with Duncan Bros. by which they had agreed to take over from Duncan Bros. the stock of merchandise at Lintner at the cost price. And Duncan Bros. acceded to the arrangement provided for by the contract last mentioned; and it was understood by all the parties concerned that Donaldson was to take the stock of goods in question from Duncan Bros., and pay the cost price therefor. In accordance with the arrangement thus made, in the month of January 1919 following, the stock of merchandise of Duncan Bros. which consisted of groceries and dry goods, was invoiced at their store at Lintner; and for the purpose of in-

voicing the stock Duncan Bros. selected C. C. Howe, and the appellant selected C. H. Hill to assist in the listing of the stock, and the fixing of the cost prices therefor; and with the assistance of these parties the stock was listed, and the prices fixed. Aside from the persons specially selected for that purpose, the appellee A. C. Duncan, his son Kenneth, the appellant Donaldson, and his son Charles, and Alonzo Adams, an employe of Duncan Bros. also participated more or less in the work of

preparing the inventory and fixing the prices of the merchandise, which constituted the stock. The evidence shows that the cost price fixed for the goods, was the cost price which prevailed at the time of the inventory; and the total value of the stock thus listed and priced was $9978. 43. It was conceded that the appellant Donaldson was entitled to a credit of $6500.00 on the amount thus ascertained, inasmuch as he had turned over to Rankin Whitham Co. and Duncan Bros. had received credit for that amount on the land purchase; also that he was entitled to a credit of $33.03 for errors made in footing up of totals on inventory sheets; and that the appellant was entitled to a further credit of $711.73, which was the amount of his commission earned as real estate agent in the sale of the land referred to, to Duncan Bros. Deducting these credits from the total amount at which the stock had been valued, left a balance of $2733.67; for this amount the appellant on March 12, 1919, following the making of the inventory executed and delivered a judgment note to the appellees which was made payable thirty days after its date. The note also provided for an attorney's fees, but the amount thereof was left blank. Sometime after this note had become due, the appellants had a judgment entered upon it by confession in the circuit court of Macon county, which included an attorney's fee of $200.00 At the October term thereafter, the appellant

filed a motion supported by an affidavit to set aside the judgment. The court ordered the judgment opened up, to enable the appellant to make his alleged defense, and to plead to appellee's claim. The appellant pleaded the general issue, with notice of a claim of set off. He also filed a special plea alleging a total failure of consideration; the special plea however, was withdrawn during the trial, and is therefore eliminated from the case. There was a trial by the court, and the court found the issues in favor of the appellees; but also found that the appellant under his claim of set off was entitled to some additional credits, namely four items, $67.00, $42.00, $25.00 and $75.00, making a total of $209.00; and thereupon rendered judgment for $2923.89 which includes $200.00 for an attorney's fee; an appeal is prosecuted from this judgment.

The principal controverted question, which is raised

on appeal concerns an item of $2200.00 claimed by the appellant as a set off against the amount due on the note in question; and it is argued that this amount represents the difference between the original cost price of the merchandise in question, and the cost price which prevailed at the time the stock was inventoried. It is contended that under the written contracts between the parties, the appellant could be required legally to pay only the original cost price of the merchandise. The contracts in evidence do not say whether the cost price mentioned is the original cost price, or the cost price prevailing at the time the contract was entered into, or at the time the inventory was made. The construction however which the parties themselves placed upon the language used, clearly indicates, that they understood the cost price referred to, to mean the cost price prevailing at the time the goods were inventoried. And the matter was adjusted on that basis. Under the circumstances

referred to courts give effect to the construction and the interpretation which the parties themselves placed upon the language of their contract; and their acts and conduct of the parties in carrying out, or giving effect to their contracts, will be considered binding. Sholl Bros v. P. & P. U. Ry. Co. 276 Ill. 267; Merle v. Beifeld, 275 Ill. 594; Gillett v. Teel 272 Ill. 106. It is a sufficient answer however to appellant's contention, to point out the fact, that there is no evidence in the record to show any other cost price than the one which was adopted by the parties at the time of the inventory.

Appellant also contends, that the burden of proof was upon the appellees to show what the original cost price was. Appellant's only defense was set off; and the rule of law is clear that where set off is pleaded as a defense, the burden of proof of such defense is on the defendant. Moreover inasmuch as the appellant did not make any motion for a new trial, he is not in position on appeal to raise any question concerning the force and effect of the evidence, nor that the findings of the court are not sustained by the weight of the evidence. "The weight of the evidence can be considered on appeal only where the question was presented on a motion for a new trial and ruled on by the trial court." Anderson v. Karstene 297 Ill. 76. Nor is the appellant in positon to

raise any questions concerning the allowance of the attorney's fee, inasmuch as there was no issue raised in the court below concerning the propriety of its allowance.

We are of opinion that there was no reversible error in the propositions numbered 3, 4 and 8, which were held by the court. The judgment is affirmed.

Affirmed.

General No. 7310. Agenda No. 26.

April Term, A. D. 1921

Elmer Kelso, Appellant

vs.

Joe Chipman, Appellee

Appeal from Fulton.

223 I.A. 658

NIEHAUS, J.

In this case the appellant Elmer E. Kelso, a real estate broker sued the appellee Joe Chipman, who was the owner of a 200 acre farm, in the circuit court of Fulton county in an action of assumpsit, to recover a commission of $600.00 which he alleged was agreed upon between him and the appellee as compensation to be paid by the appellee f ihe found a purchaser for the farm referred to.

The declaration alleges that the appellant found a purchaser namely, Thomas M. Weber, who negotiated with the appellee and finally bought the farm in question for $30,000.00; that thereby the appellee became liable to the appellant for the commission agreed upon. The record discloses a conflict in the evidence concerning the matter of how the purchaser was procured, and who procured the purchaser; and it was a contested question in the trial court whether the appellant by the efforts which he made, had induced Weber to become a purchaser, and was the first to interest him in the matter of the purchase of the farm; and whether the appellant also induced him to take up the negotions for the purchase of the farm with appellee which finally resulted in its sale. There was a trial by jury and the jury found a verdict in favor of the appellee, upon which judgment was rendered, and this appeal is prosecuted from the judgment.

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The main contention which arises on appeal concerns the giving of certain instructions, and it is claimed that a number of them were erroneous and misleading. Errors in that respect are pointed out with reference to Instructions 5, 6, 7, 8, 9, 11 and 12. The 5th instruction is to the effect that if the jury believed, that the appellee by his tenant was in communication with Weber the purachser relative to the sale of the farm prior to any negotiations relating to the sale of the farm between the appellee and Weber; and that the **sale** of the

farm was solely brought about by the appellee, that then it was the law that the appellant could not recover anything for commissions for the sale, even though they might believe that the appellant did make some efforts to interest Weber in the farm. This instruction is clearly erroneous, in that it makes the appellants right to recover commissions depend on whether the sale of the farm was solely brought about by the appellee, and in effect told the jury that if such sale had been brought solely by the appellee, that then the appellant had no right to recover. It was conceded that the appellee had solely conducted the final negotiations which resulted in the sale of the farm by him to Weber; but this did not necessarily deprive the appellant of the commissions, if the appellant was the one who induced Weber to become such purchaser, even though he had nothing to do with the matter of the sale by the owner. Hafner v. Herron 165 Ill. 242; Pridmore v. Wilson 159 Ill. App. 343; Rounds v. Victoria Hotel Co. 184 Ill. App. 501. Substantially the same error appears in Instructions 6 and 7; and by Instruction 8 the jury could easily be misled into the same erroneous conclusion. Instruction 11 was also objectionable; it told the jury, that the existence of the contract between the appellant and appellee would not prevent the appellee from selling the farm himself to a purchaser procured by the

appellee and under circumstances as would not entitle the appellant to recover a commission from appellee without specifying the circumstances. This instruction was misleading in that it assumes in effect, that the sale of the farm in question was to a purchaser procured by the appellee; and could readily be construed by the jury to mean in connection with the other instructions referred to, that the circumstances under which the appellant would not be entitled to recover a commission, were present in the case on trial. We are of opinion that Instruction 12 is objectionable for the same reasons stated concerning Instruction 5.

We find no reversible error in the admission or rejection of eivdence; but for the errors indicated; and for the reasons stated, judgment is reversed and the cause remanded.

Reversed and Remanded.

General No. 7344 Agenda No. 56

April Term, A. D. 1921

Jesse A. Miller, Administrator of the Estate of George W. Woodward, deceased, Appellee

vs.

Chester & O'Byrne Transfer Co., Appellant

Appeal from Champaign.

NIEHAUS, J.

This suit was brought in the circuit court of Champaign county by the appellee Jesse A. Miller as administrator of the Estate of George W. Woodward deceased, for the benefit of the widow and next of kin of said deceased, to recover damages suffered on account of the death of the deceased, which it is alleged was caused by the negligence of the appellant, Chester & O'Byrne Transfer Co. There was a jury trial, which resulted in a verdict and judgment in favor of the appellee for $3000.00 This appeal is prosecuted from the judgment.

The negligence charged is the running of appellant's automobile taxi cab at a high and illegal rate of speed on University Ave. in the city of Urbana, and thereby coming into collision with the deceased who was riding along the avenue in question ahead of the taxi cab. The evidence tends to show, that on May 15, 1920, about 8 o'clock in the morning, the deceased Woodward was riding on a bicycle going eastward on University Avenue to his work; that just before reaching a certain driveway on the north side of the avenue, east of Orchard street, he turned north easterly toward this driveway; and that while doing so, appellants taxi cab ran into him, knocked him off of his wheel, and to the payment, whereby he received injuries from which he died. It was claimed on the trial as a matter of de-

fense that Woodward in making the turn towards the driveway had failed to give a signal with his hand, as required by the traffic ordinances of the city of Ubana; and that his failure to do so contributed to bring about the accident in question. Appellant on the trial offered to put in evidence the ordinance referred to; appellee objected to its introduction, and the court sustained the objection; and the ordinance was not admitted; this ruling of the court is assigned as error. We are of the opinion that the ordinance was competent and material; and that the appellant had a

right to have the same submitted as evidence to the jury. The appellee had waived the necessity of preliminary proof to establish the fact that the ordinance had been duly passed and published, and that it was in force. It was competent and material and should therefore have been admitted. Doyle v. Village of Bradford 90 Ill. 416; C. & E. I. v. People 120 Ill. 667.

The appellees contends, that the ordinance was properly rejected, because it is inconsistent with the provisions of the Motor Vehicle Act; and because its provisions are already covered by the act; also because the ordinance is unreasonable in its terms. We cannot agree with this contention; the ordinance appears to be no more unreasonable in its requirements than the Motor Vehicle Act itself; but is somewhat broader in its scope. The requirement of a signal with a whip or hand, as well as with the arm signal, required by the Motor Vehicle Act, is not inconsistent with the provisions of the act, but simply adds a further requirement. Paragraph 26 of the Motor Vehicle's Act of 1919 expressly provides that "nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations, motor trucks and motor driven commercial vehicles used within their limits for public hire or making and enforcing reasonable traffic and

other regulations except as to rate of speed which are not consistent with the provisions of the act." The City of Urbana therefore was within its powers in passing and enforcing the ordinance in question. Nor is there anything unreasonable in the requirement that the hand as well as the arm is required to be used for signaling. A point is made concerning the lack of proof as to the time of the passage of the ordinance; we think this was covered by the waiver of preliminary proof. For the error indicated, the judgment is reversed and cause remanded.

Reversed and remanded.

GENERAL NO. 7257 AGENDA NO. 43

OCTOBER TERM, A. D. 1920.

Harriet L. Anderson, Administratrix of the estate of Thomas D. Anderson, deceased, Defendant in Error

vs.

John Barton Payne as Agent of the United States Government, Plaintiff in Error

Error to the Circuit Court of Vermilion County

PER CURIAM

The writ of error in this case is prosecuted to reverse a judgment, for $3500.00 and cost, recovered by defendant in error, as administratrix of the estate of Thomas D. Anderson, deceased, who was struck by a passenger train and killed when attempting to walk across the tracks of the Chicago and Eastern Illinois Railroad Company, at the Main street crossing in Hoopeston, Illinois.

The negligence charged in the several counts in the declaration is a violation of an ordinance limiting the rate of speed at which passenger trains might be run, while within the corporate limits of the city of Hoopeston, to ten miles an hour; failure to ring the bell or sound the whistle on the engine of the train for a distance of eighty rods while approaching the Main street crossing; a violation of the duty to maintain a watchman or gates or similar device for warning, at such crossing, of the

approach of trains; and a general charge of careless, negligent and improper management of the train whereby decedant was not advised of its approach.

Hoopeston is a city of six thousand inhabitants. The street on which the accident happened is its principal street built up solid with business houses directly east of the railroad and on the west by business houses, residences and factories. From two hundred to three hundred people crossed the railroad tracks on this street, daily, during the thirty minutes immediately preceeding seven o'clock A. M. at which hour an emlpoyee of the

railroad company went on duty to raise and lower gates at the crossing in compliance with with the requirements of an ordinance in reference thereto.

On the morning of September 26, 1918, a number of people had congregated at the crossing in quesiton while it was blocked by the passing of a south bound freight train composed of forty five cars, intending to cross as soon as such freight train had passed. Thomas D. Anderson had come from the east and was standing near the east side of the north bound track. A few feet in front of him was a man and just behind him were two young ladies. People were standing on the walks on each side of the street, others were in an automobile and two with bicycles — all waiting

to cross the tracks. Immediately after the freight train had cleared the crossing the man in front of decedant crossed the tracks. Anderson and the young ladies attempted to do so when he was struck by a north bound fast passenger train, known as the Dixie Flyer, at five minutes of seven o'clock running one hour and a half late.

A large number of errors assigned on the record are abandoned by not being argued. (International Harvestor Co. v. Industrial Board, 282 Ill. 489, 492). Those argued are that the verdict of the jury is against the weight of the evidence; improper argument of counsel; errors committed in rulings in reference to the admission and to the exclusion of evidence; and in giving and in refusing to give instructions.

The evidence establishes that the passenger train had been running, in violation of the provisions of an ordinance, through the corporate limits of the city to within a quarter of a mile from Main Street at a rate of from fifty to fifty-five miles an hour and there is ample evidence to support the contention that its speed had only been reduced to from twenty to twenty-five miles an hour at the time of the accident.

Independent of any ordinance it was the duty of the railroad company, at common law, to regulate the speed of its trains

with proper regard to public safety. (Overton v. Chicago and Eastern Illinois Railroad Co. 181 Ill. 323, 326; Elgin, Joliet and Eastern Railroad Co. 229 Ill. 621, 629) and the jury were justified in finding that it was negligence to run the passenger train in question over the crossing at the rate of speed it was running at a time when the gates were not being operated.

The jury were properly instructed in reference to what facts should be established by defendant in error in order to be entitled to recover and that such facts could only be established by a preponderance of the evidence. The evidence was conflicting as to all such facts and we would not be justified in disturbing the verdict of the jury unless able to say that it was against the manifest weight of the evidence (Toledo, Wabash and Western Railway Co. v. Harmon, 47 Ill. 298, 303; St. Louis, Jacksonville and Chicago Railroad Co. v. Terhune, 50 Ill. 151, 152, 153) and that we are unable to do.

We express our disapproval of several statements made to the jury by one of the counsel for defendant in error but after a consideration of all the reasons urged for a reversal of the judgment of the trial court have then reached the conclusion that the reasons assigned are not well founded and that such judgment should be affirmed.

Judgment affirmed.

Abstract only
2113 b

GENERAL NO. 7260 AGENDA NO. 44

OCTOBER TERM, A. D. 1920

Edward S. Bradbury, Appellant

vs.

John Barton Payne, Director General of Railroads, etc. Appellee

Appeal from Circuit Court Ford County.

PER CURIAM 223 I.A. 659

Appellant purchased a railroad ticket at the Twelfth Street Station of the Illinois Central Railroad in Chicago on June 19, 1919, entitling him to be carried as a passenger to Bellflower, where he lived. He got upon a train which left Chicago at 9:45 o'clock on the night of that day and which was not scheduled to stop at Bellflower. The ticket reads as follows: "Illinois Central R. R. One continuous passage Chicago (C. S.) Ill. to Bellflower, Ill. Good one day from date of sale for continuous trip via short line on trains scheduled to stop at destination, otherwise passenger must transfer to local train. - D. J. Phelps, Gen. Pass. Agent." When he presented the ticket to the conductor the latter informed him that the train did not stop at Bellflower, and that he would have to get off at Gibson City, and wait for another train. He told the conductor he would not get off at Gibson City. When the train arrived at Gibson City, the conductor again requested him to get off which he refused to do. There-

upon the conductor asked a policeman at the station to remove him from the train. When the policeman approached appellant, the latter said "I will not resist an officer. You can arrest me, and take me off", and he thereupon left the train with the policeman and walked with him to the city hall where nothing further was done in regard to the matter, and appellant waited in Gibson City until a train arrived which took him to Bellflower. Appellant brought this suit which is an action on the case to recover damages for the humiliation suffered by him on account of

being compelled to leave the train at Gibson City in the manner mentioned. At the close of all the evidence on motion of appellee the jury was directed to find appellee not guilty by their verdict. This action of the court is assigned as error as was its action refusing to admit certain offered evidence.

It has long been the settled rule of this state that as between the conductor of a railroad train and a person riding thereon, the latter's right of transportation depends upon his ticket. The ticket presented by appellant entitled him to ride on such trains only as were **scheduled to stop at Bellflower,** the destination named on the ticket. His ticket did not entitle him to ride upon the train in question and when the conductor informed him

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of that fact and requested him to leave the train at Gibson City and to take the next train which would stop at Bellflower, it was his duty to do so. It is not claimed that either the conductor or the policeman used any unnecessary force or any force at all in causing him to leave the train. Whatever indignity, humiliation, or mental anguish appellant may have suffered by being compelled to leave the train in company with the officer was the direct result of his own conduct, and he cannot recover damages from appellee therefor. Pennington vs. I. C. R. R. Co. 252 Ill. 584; Kiley vs. Chicago City Ry Co. 189 Ill. 384; Pennsylvania R. R. Co. vs. Connell, 112 Ill. 295; Pullman Palace Car Co. vs. Reed, 75 Ill. 125; C. B. & Q. R. R. Co. vs. Griffin, 68 Ill. 499; Malmgren vs. A. E. & C. R. R. Co. 193 Ill. App. 241.

Appellant testified that the ticket agent in Chicago informed him that the train stopped at Bellflower, and that when he went to get on the train he informed the porter that he desired to go to Bellflower, and the porter directed him to the car which he entered, and it is now urged that for this reason appellee is liable. Neither the ticket agent nor the porter could waive the limitations on the ticket without authority to do so of which there was no proof. Pennington vs. I. C. R. R. Co. **supra.**

Page 3

Appellant offered to prove by the witnesses Flint and W. J. Carlisle that they rode from Chicago to Bellflower the latter part of the year 1917 on the same train, and that it stopped at Bellflower; by the witness F. W. Carlisle that the train stopped at Bellflower in August, 1918; and by the witness Fry that the trian stopped at Bellflower two years before June 19, 1919. It is now urged that the court erred in refusing to admit this evidence. There was no error in such ruling.

The judgment of the Circuit Court is affirmed.

(217 a)

General No. 7371 Agenda No. 20

October Term, 1921

Lotus Grain & Coal Company, a Corporation,
Appellee,

vs.

L. E. Zimmer, Appellant.

Appeal from Champaign.

HEARD, J.

223 I.A. 659

Appellee brought suit in assumpsit against appellant to recover damages for an alleged breach of contract for the sale of corn by appellant to appellee. A trial in the circuit court resulted in an instructed verdict for appellant, from which judgment appellee appealed to this court where the judgment was reversed and the cause remanded. A second trial resulted in a judgment for $650, damages and costs in favor of appellee from which judgment this appeal was taken.

Complaint is made by appellant of the giving of instructions. When this case was here before the court held that a valid written contract had been entered into between the parties. The contract is fully set forth in the former opinion of this court, to which opinion reference is made for the terms of the contract and the construction placed thereon by this court. Lotus Grain & Coal Co., v. Zimmer, 217 Ill. App. 592. The instructions of which complaint is made are in accordance with our former holdings, and, while the personnel of the court has changed, the former holdings are binding upon us in this case. We find no error in the court's ruling upon instructions.

Appellant contends that under the evidence appellee is not entitled to recover. While the evidence is conflicting Appellee's witnesses testified to a state of facts which, if believed by the jury, warranted a verdict for appellee. The jury evidently did so believe and we would not be justified in disturbing their finding. The judgment is affirmed.

(2152)

General No. 7381 Agenda No. 30

October Term, 1921

Harry Gilbert Brown, by Stella Brown, his Next Friend,
Appellee

vs.

Loretta R. Lowry, Appellant

223 I.A. 659

Appeal from McLean

HEARD, J.

This is a suit brought to recover damages for injuries sustained by Harry Brown, a minor, as the result of a collision between a bicycle on which he was riding and an automobile of appellant, driven by her daughter. A jury trial resulted in a judgment for appellee against appellant for $1400 damages and costs, from which judgment this appeal was taken.

The collision occurred about 4:30 P. M., October 1, 1920, in broad daylight, on Main street, a north and south street, in the Village of Normal some distance north of the intersection of that street and Harris street. The first house north of this intersection on the east side of Main street was a house known as the Carlson house. Some distance further north and on the west side of the street was the Brooks house. Each of these houses was set back a short distance from the street and each had a driveway running down to Main street.

As appellant and her family came north on Main street in the automobile driven by his daughter, Harry Brown, a boy 12 years of age, who was delivering papers, after leaving a paper at the Carlson home, came down the Carlson driveway and started to cross Main street diagonally to deliver a paper at the Brooks house. When he was within a few feet of the west curb his bicycle was struck by appellant's automobile and he was severly injured under circumstances which would render appellant liable if appellee's witnesses are to be believed. There is, however, a sharp conflict in the testimony and if appellant's witnesses are to be believed appellant was not guilty of negligence and the accident was caused by the negligence of Harry Brown

in suddenly attempting to cross the street in front of appellant's automobile.

Complaint is made that the court erred in excluding

a written statement signed by appellee's witness Smoot, which contained statements tending to impeach his testimony given on the trial. The paper contained statements which were not competent and there was no error in sustaining the objection to the paper as a whole. The paper did contain some portions which were proper matters of impeachment and when these portions of the statement were offered seperately they should have been admitted in evidence.

Complaint is made by appellant of the admission in evidence of an ordinance of the Village of Normal without proof of its publication. It was a penal ordinance and required publication. Just how this portion of the ordinance which was read in evidence was competent we fail to see. It is either meaningless or refers to a motor vehicle approaching a street car.

Complaint is made that counsel for appellee were guilty of misconduct in bringing out the fact that an insurance company was interested in the defense. This was improper and might have been reversible error. Appellant is not in a position, however, to raise this question as when objection was made the court very properly said "It is improper and if you want to have this case continued, I will do that." Appellee by failing to take advantage of the court's offer of a continuance must be held to have waived the error. She chose to take her chances on the jury's verdict and so cannot now take advantage of the misconduct. Appellant's attorney in the cross examination of the doctor who testified as to the boy's ailments was guilty of similar misconduct.

The first instruction given by the court at the request of plaintiff is one which has been repeatedly condemned for referring the jury to the declaration for the elements necessary to entitle the plaintiff to recover. This instruction was particularly bad for the reason that the declaration had been amended by the addition of six counts and

four of these additional counts were materially amended previous to the trial.

The court at the request of the defendant gave to the jury the following instruction:

"4. The Court instructs the jury that if you believe from the evidence that the defendant's car as it approached the plaintiff was being operated at a greater

rate of speed than fifteen miles per hour, and that the plaintiff before and at the time of the happening of the collision was in the exercise of due care and caution for his own safety, and that the defendant's car ran into and struck the bicycle on which the plaintiff was riding and that this occurred in a residence district within the corporate limits of the Town of Normal, and if you further believe from the evidence that the driving of said car at such speed if any such is proven by the evidence, was the proximate cause of the injury to the plaintiff, you should find the defendant guilty."

This instruction makes the operation of appellant's car at a greater rate of speed than 15 miles per hour conclusive evidence of negligence. The law in force at the time of the accident did not prohibit the operation of an automobile at the place in question at 15 miles per hour, or any specified rate of speed. The statute in force at the time prohibited the driving of an automobile upon any public highway "at a rate of speed greater than is reasonable or proper having regard to the traffic and the use of the way or so as to endanger the life and limb or injure the property of any person." The law also provided if the rate of speed of an automobile operated upon and public highway of the state where the same passes through the residence portion of any incorporated city, town or village shall exceed 15 miles per hour, such rate of speed shall be prima facia evidence that the person operating such automobile is running at a rate of speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. Operating an automobile

at the place in question at a rate of speed greater than 15 miles per hour would only be prima facia evidence of negligence which might be overcome when all the evidence in the case was considered together. It was not negligence per se, or conclusive evidence as would be the rule were the law as stated in this construcction.

In Cont. Beer Pump Co. vs. Cooke Co. 299 Ill. 105, the Supreme Court in passing upon the effect of a Statute which made the report of a referee to whom an account had been referred in an action of assumpsit, prima facia evidence said: "The provision of the statute

that the report shall be prima facia evidence means simply that in the absence of any contrary evidence the finding or verdict is to be in accordance with the report. It is not a question of evidence and does not change the burden of proof. When evidence is introduced and submitted to the jury the case is to be determined upon the whole evidence." The giving of this instruction was reversible error.

The judgment is reversed and the cause remanded.

General No. 7389 Agenda No. 36.

October Term, A. D. 1921

George W. Paullin, Appellant,

vs.

William S. Watson and Harriet Francis Watson, Appellees.

Appeal from Champaign

223 I.A. 659

HEARD, J.

This is a suit brought by appellant against appellees to recover the purchase price of a fur coat purchased from appellant by appellee Harriet F. Watson, wife of appellee, William S. Watson. A jury trial resulted in favor of appellees and a motion for a new trial was denied.

The abstract in this case shows neither the rendition of a judgment or a prayer for appeal in the court below. There is therefore nothing before this court for review. People v. Shapiro, 203 Ill. App. 292; Sellers v. Puritan Product Co., 217 Ill. App. 617.

The appeal will therefore be dismissed.

(211 a)

General No. 7421 Agenda No. 60

October Term, 1921

John T. Fahey, Edgar F. Richards, J. Frank Ryley and J. Carroll Fahey, partners doing business under the firm name of John T. Fahey & Company,

Appellant

vs.

223 I.A. 660

Sidney Grain Company (a corporation), Appellee

Appeal from Champaign.

HEARD, J.

Appellants, grain exporters of Baltimore, Md., brought suit in assumpsit against appellee, an Illinois corporation, engaged in the grain business at Sidney, Ill., for an alleged breach of contract for the sale and delivery of corn. A trial of the case resulted in a judgment for appellee in bar and for costs, from which judgment this appeal is taken.

In January 1917, I. H. French & Co., were doing a grain brokerage business at Champaign, Ill. On January 13th or 14th, or on both days a representative of appellee and a representative of French & Co. had conversations resulting in a contract for the sale by appellant of 10,000 bushels No. 3 corn at 95c per bushel to be delivered in January or February, 1917 to appellants at Baltimore on a basis of 19.2 export rate, with Baltimore rates and official inspection, appellee to draw on appellant for the amount due on the shipment of the corn.

It is claimed by appellee that this contract was not made with appellants, but with French & Co., but the great weight of the evidence is that at the time of making the contract French & Co., were acting for appellants and that the representative of appellee was fully aware of that fact.

No corn was shipped to Baltimore under this contract by reason of inability to get shipping permits on account of an embargo on Baltimore, during January and February, but the evidence shows that the time for shipment was extended.

March 14, 1917, appellants sent appellee the following "Please ship the 10,000 bus. of corn, due us on contract, to Messers Rumsey & Co., Chicago, Ill., for our

account."

April 12, 1917, appellee shipped a car of corn to Rumsey & Co., and wrote appellants as follows: "We are today shipping FIRST car white corn to Rumsey & Co., for your account. Will ship more as we get cars, have asked for cars to go Chicago, any thing you can do for us in the way of getting cars would be appreciated as we have the corn to load."

April 14, appellants wrote appellee as follows: "Yours of the 12th enclosing us copy of invoice covering shipment of 1 car corn, to Rumsey & Co., Chicago for our account at hand. We thank you for this shipment and sincerely hope you may be able to fill out this sale in the next few days. You may rest assured if we can do anything in the way of securing cars for you, we will do so. We have been using our best efforts to help shippers in this direction, but it seems to be rather uphill work to secure empties."

April 18, appellee shipped Rumsey another car of corn and on April 20 wrote appellants as follows: "Have shipped to Rumsey & Co., of Chicago, Ill., 5100 bu. corn as per your instructions and will say in regard to balance, that we claim inasmuch as we offered you the balance during the life of contract and did not get any billing for same that this fills our part of the contract and will consider it closed." To this letter appellants replied by telegram declining to accept cancellation of the contract. April 20, 1917 No. 3 corn was worth $1.51 to $1.53 on the Chicago market. Other correspondence took place between the parties without result whereupon appellants brought this suit to recover their damages.

At the request of appellee the court gave to the jury the following instruction:

"12. You are instructed that if you believe from the evidence that it was a part of the undertaking of the plaintiffs in this case that they would do anything within their power in the way of securing cars for the shipment of the corn in question, then it is incumbent upon the plaintiffs to show by a preponderance of the evidence that they complied with this provision of the contract; and in the absence of any such evidence it would be your duty to find that issue in favor of the defendant."

There was no evidence in the case on which to base

this instruction. It is true that Best, the representative of appellee, testified that at the time of making the contract "I asked them with regard to possible embargo on shipments East, and they answered me in case of embargo, anything of that kind came up, they thought they would take care of the situation by getting permits. --a system which was in vogue a good deal, and they thought they would be able to get the car billed by getting permits, even if there was an embargo." This statement that they thought they could get the car billed by getting permits falls far short of an undertaking as a part of the contract "to do anything within their power in the way of securing cars for the shipment of the corn." The natural effect of this instruction would be prejudicial to appellants and its giving reversible error.

The court gave to the jury the following instruction:

14. "The Court instructs the jury that if you believe from the evidence that the defendant company or some of its officers or agents tendered delivery of certain cars of corn of the kind specified by the alleged contract, to the plaintiffs or their authorized agents,, in keeping with the contract of sale if you find there was such contract, then such tender is presumed in law to be a tender upon such contract notwithstanding that no demand for credit upon such contract may have accompanied such tender."

There is no evidence in the record of any tender of delivery of cars of corn to appellee or any evidence of any tender of delivery of corn to any agent of appellants authorized to receive such corn. The original contract called for the delivery of the corn by appellee to appellants at Baltimore, Md., where the corn was to officially inspected and rated. The evidence in the record falls far short of showing a legal tender.

The court at the instance of appellee instructed the jury as follows:

"15. The Court instructs the jury that if you believe from the evidence in this case that the defendant offered to sell 10,000 bushels of corn to French & Company upon the condition that they were to be guaranteed against any embargo thereon, and that French & Company in accepting said offer of sale did not accept said offer upon the terms proposed by the plaintiffs, but ac-

cepted the same without any proviso as to guaranty against embargo, then such offer and acceptance would not constitute a contract in law and in the absence of further proof that the defendant had waived their said proposition requiring the guaranty against an embargo if you find from the evidence there was no such proof, there would be no contract between the plaintiffs and the defendant."

This instruction is not based upon the evidence and its giving was reversible error. There is no question but what a contract was entered into. The representative of French & Co. who conducted the negotiations for appellants testified that he bought 10,000 bu. of corn from appellee and Best, the representative of appellee, who conducted the negotiations on the part of appellee, testified that he sold the 10,000 bu. of corn. That there was a contract is also shown by all the letters and telegrams in evidence.

These instructions were prejudicial to appellants and their giving was reversible error.

The judgment is reversed and the cause remanded.

General No. 7300. Agenda No. 17

April Term, 1921

Arthur Swain, Appellee.

vs.

John Barton Payne, Director General of Railroads, Appellant.

Appeal from Morgan

223 I.A. 660

NIEHAUS, J.

In this case the appellee Arthur Swain sued the Director General of Railroads operating the Chicago & Alton Railroad to recover damages for alleged negligence in the shipment of 84 head of cattle from Chicago to Sinclair, in Morgan County. The declaration charges, that the cattle were negligently and unreasonably delayed in transit; and were negligently allowed to be kept confined in appellant's cars more than 36 hours without feed and water; and were not delivered and unloaded by the appellant promptly; and, that by reason of this alleged negligence of the appellant, the cattle in question became sick, injured and damaged, and two of the cattle shortly thereafter died. To the charge of negligence in the declaration the appellant pleaded the general issue. There was a trial by jury, which resulted in a verdict, and judgment in favor of the appellee for $420.00; from this judgment an appeal is prosecuted.

Appellant contends, that the evidence does not show any negligence in making the shipment, nor unreasonable delay in carrying the cattle to their destination; also, that the evidence does not sufficiently show, that the injury or disease which was found in the cattle when unloaded at Sinclair, was caused by any delay in the shipment. We are of opinion, that

the jury were warranted from the evidence in the conclusion which they reached on these questions; also that the appellee was damaged to the full amount found by the jury. Appellant contends, that error was committed in asking Dr. Charles E. Scott, a witness for appellee, a hypothetical question as an expert on diseases of cattle, and the causes thereof. The hypothesis was based upon the diseased condition of the cattle, at the time that they were unloaded; and the object of the inquiry was to get his opinion, as to the cause of the

diseased condition of the cattle. His answer was, that exposure would naturally cause the condition of catarrhal trouble, from which the cattle were suffering. We think, there was no error in allowing the doctor to give his opinion as to the cause of the disease, with which the evidence showed, the cattle had been afflicted, at the time they reached their destination. Questions of this character have been held competent and proper under the circumstances here presented. People v. Penman 271 Ill. 82; Holcomb v. McGee 217 Ill. App. 272. The opinion of the witness therefore, cannot be considered an invasion of the province of the jury concerning the determination of ultimate facts. Complaint is also made of the giving of the 1st and the 3rd instructions for the appellee. The 1st instruction contains an abstract proposition of law; and appellant contends, that it is misleading, because it may be interpreted, to assume that the court thought that the cattle in question, had been injured by delay in transit. The instruction, though in the abstract, states the principles of law involved with substantial correctness; and it is not apparent, that the jury could have been misled into the assumption suggested by appellant; especially when the instruction is considered in connection with the instructions concerning the same matter

given for the appellant. Appellant's criticism of the 3rd instruction is, that it assumes negligence on the part of the appellant. We do not think this criticism is justified; a reasonable construction of the language of the instruction, does not warrant such an inference; and appellant's instructions are strong and clear upon the legal requirements, and the neccesity of proof, of the negligence of appellant as alleged. The record does not disclose any reversible error and judgment is affirmed.

Judgment affirmed.

General No. 7303 Agenda No. 20

April Term, 1921

Edward P. Irving, Appellee

vs.

Joseph Ayers and John T. Ayers, Appellants

Appeal from McLean

NIEHAUS, J.

This appeal is from the judgment for $3085.00 rendered in the circuit court of McLean County in favor of Edward P. Irving, appellee, and against the appellants, Joseph W. Ayers and John T. Ayers. The question presented for review, concerns the allegations made in defense of the suit, in four special pleas, to which a demurrer was sustained by the court. The first special plea avers, that before the making of the note which is the basis of the judgment, one W. E. Surface who was the owner of a dairy farm, and the appellee, Joseph W. Ayers, entered into a co-partnership agreement to conduct a dairy business; and for the purpose of raising, buying and selling cattle, hogs and other stock, as well as general farming; the partnership to commence Sept. 1. 1918, and continue until February 28, 1924. Surface was to contribute to the partnership, the use of his farm, which contained buildings for dairy purposes; silos, and other structures, required for farm purposes; also the milking equipment, which was on the farm, consisting of milking machines, gasoline engines, pump shafting, etc. Ayers to live in the house on the farm, and to contribute, without expense to the partnership, all the labor necessary for conducting the business, operating the farm, and delivering the products thereof. The partnership was to buy, through equal contribution of the partners, all

live stock, implements, feed and grain, used on the farm; and to take over by equal contributions of the co-partners, all live stock, tools and equipment; except as before mentioned; the prices to be agreed upon by the co-partners, or fixed by disinterested persons. Ayers was to furnish any machinery or equipment which he owned, for prices to be agreed upon. No contracts were to be made without the advice and consent of both parties; all monies received, were to be deposited in a designated bank in De-

catur, and paid out by checks signed by Surface; that Ayers was to give his entire time to the business; and Surface was not required to give any of his time to the management, or work of the partnership business, but that Ayers was to consult with Surface as to all matters; that Ayers was to keep accurate books of account, including a record of all cows; such records to be open to inspection of Surface at all times; and Ayers was to have the use of the house on the farm, and all necessary fruit; also, the garden and truck patch. It was also agreed, that Surface should keep the exterior of the building used in said co-partnership business in repair; that Ayers should do all the hauling; and that any alterations or additions, and expenses in maintaining milking machinery, water supply and equipment of the farm were to be paid for by the partnership; which milking machinery was to be left on the premises at the expiration of the partnership; that the partnership was to pay the expense of the rent of a tenant house, if the same should be necessary, to house any of his employes; that the partnership was to re-imburse Surface for the expense of seed and labor in putting in the wheat then sown on the land, and also pay for the expense of the seed and labor of putting in the alfalfa then sown and growing on the farm. The partnership agreement also contains stipulations

concerning the amount which each partner could draw from the earnings of the partnership, and concerning the accounting to be had, and concerning the earnings accummulations which were to be equally divided between the partners. Upon the expiration of the term of the agreement, the partnership was to end, unless extended in writing; that thereupon Ayers should vacate the premises, without notice; that at the end of the partnership, or at a sooner termination thereof, the parties thereto, were to make a true just and final account of all things relating to the business of the partnership, and in all things adjust the same; that the stock, machinery, utensils or other property was to be sold, and the proceeds divided equally between the partners, or otherwise disposed of, as the parties to the agreement should mutually agree. The plea further avers, that the parties mentioned, pursuant to the partnership agreement, conducted the dairy busi-

ness specified in the agreement, and gathered together a large number of milch cows, namely sixty, and transacted a profitable business; that on the 9th day of June 1919, then entered into another written agreement, which recites the fact, that they desired to terminate the partnership on Jan. 1, 1920; that, in order to amend and supplement the partnership agreement referred to, stipulated and ageed, that Surface in consideration of the terms of the partnership agreement, and of the agreement of Ayers to vacate the premises on Feb. 28, 1920, agreed to pay Ayers the sum of $2500.00, and it was further agreed, that the partnership business, should be continued and conducted in accordance with the partnership agreement, until such time prior to Feb. 28, 1920 as the parties might mutually agree to sell or dispose of the personal property belonging to the partnership, which sale or other disposition, should take place some time during the months of October, November

or December, 1919, and prior to the 28th day of Feb. 1920; that during the months of October, November or December, a just and final account of the partnership business should be made, and the machinery, stock, etc., should be sold at public auction or otherwise divided equally between the parties. The plea further avers, that the partnership business was continued under the partnership agreement referred to, as modified, from Sept. 11, 1918 to June 11, 1919, and that large profits were made. It is further avers, that on June 11, 1919, the personal property of the partnership business, excluding the rights in the land and buildings of said Surface, used in said business, was sold to the appellants Joseph W. Ayers and John T. Ayers, for the sum of $10,000.00, of which sum, $1500.00 was cash, and the balance was in the form of four promissory notes, one for $2500.00 and three notes for $2000.00 each, payable in one, two, three and four years respectively, from June 1, 1919, which are the four prmoissory notes described in Plaintiff's Declaration. The plea further avers, that thereupon Surface, and the appellants, entered into a certain agreement, which is in words and figures as follows::

"This Agreement, made and entered into this 11th day of June, A. D. 1919, by and between William E. Surface, party of the first part, and Joseph W. Ayers

and John T. Ayers, parties of the second part, Witnesseth:

The party of the first part, for and in consideration of the sum of One Dollar ($1.00) to him in hand paid, the receipt whereof is hereby acknowledged, and in further consideration of the agreement by the parties of the second part to pay the indebtedness of the co-partnership heretofore existing between William E. Surface and Joseph W. Ayers, under the firm name and style of "Surface Farm" does hereby assign, transfer and set over

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unto the parties of the second part all his interest in the said partnership, except as hereinafter provided:

The party of the first part does hereby assign, transfer and set over unto the parties of the second part all his interest in the personal property belonging to the said partnership, including all his interest in the crops now growing on the farm more particularly described in the partnership agreement of the 21st day of August, A. D. 1918, except the party of the first part is to receive the sum of Fifteen Hundred Dollars ($1500.) out of the wheat crop when it is sold, and the parties of the second part agree to pay to the party of the first part the sum of Fifteen Hundred Dollars ($1500.00) out of the wheat crop whenever it is sold.

The party of the first part does further assign transfer and set over to the parties of the second part all money in bank and any accounts owing the said co-partnership, and does hereby authorize the parties of the second part to collect the same without any liability too account to him for the proceeds thereof.

The parties of the second part do hereby covenant and agree to pay all the indebtedness of the said partnership and to save and keep harmless the party of the first part from any liability on account thereof.

It Is Futher Agreed by the parties of the second part that they will vacate the premises now occupied by the said partnership and deliver up possession of the same to the party of the first part on or before March 1, 1920.

In Witness Whereof the parties hereto have hereunto set their hands and seals to this instrument executed in duplicate the day and year above written."

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The plea then alleges, that under and by virtue of the foregoing written contracts, it was the duty of Surface to keep the exterior of all buildings on said premises in repair, but that on the 26th day of July, 1919, he permitted the exterior of the large cattle barn, in which all of the milch cows and cattle feed were kept, to be wholly destroyed, and that thereafter until the 28th day of Feb. 1920, Surface refused to rebuild said building; that the appellants had no other building, than the cattle barn referred to, in which to house their milch cows, and were thereby compelled to sell and dispose of said cattle, and on the 13th day of August 1919, to abandon and cease operating said dairy business for want of a place in which to care for said cattle, and to conduct said business, to the damages of the appellants of $10,000.00, and that the appellants suffered great loss of profits, to wit $10,000.00, which they would reasonably have made in said dairy business up to the expiration of the time fixed in said written contract.

The foregoing matters set up in the plea, are averred as a basis for the alleged defense by the appellants, that there was a failure of consideration for the note in question, which it is also averred, was assigned to the appellee after maturity.

The second special plea alleges substantially the same facts concerning the partnership agreements, and the failure of Surface, to rebuild the cattle barn, also as a basis of appellants claim of failure of consideration of the note in controversy which it is averred the appellee is not a bona fide holder of, for value in due course.

The appellants also filed two additional special pleas which allege the same matters of defense to the appellee's right of recovery. The appellee filed a demurrer to the special pleas referred to, which demurrer was sustained, and the appel-

lants thereupon withdrew the plea of the general issue, which had been previously filed to the declaration, and stood by their special pleas, and the court thereupon awarded to the appellee a judgment for the sum mentioned. From this judgment an appeal is prosecuted.

The appellants contend, that the matters set up in the pleas show that there was a failure of the consideration for the notes in question. The averments in the pleas which concern the consideration for the notes are,

that on June 11, 1919, the personal property of the partnership business (excluding their rights in the land, and building of Surface, used in said business) was sold to the appellants, Joseph W. Ayers and John T. Ayers, for the sum of $10,000.00, of which sum $1500.00 was cash; and that the balance was in the form of four promissory notes, one for $2500.00, and three notes for $2000.00 each, payable in one, two, three and four years respectively, from June 1st, 1919. It is apparent from this averment, that the notes in question were given in part payment of the personal property of the partnership business, which was sold to the appellants. There is no averment in the plea, that the appellants did not receive the personal property of the partnership business, in part payment of which the notes referred to, were given; and the necessary inference is, that they did receive it, hence it is apparent, that the consideration did not fail for which the notes had been given. It is true the plea also alleges, that there was a failure on the part of Surface to carry out the obligation which it is claimed he assumed in the partnership agreement entered into between him and the appellant Joseph W. Ayers, to keep the exterior of the buildings, which he had contributed to the partnership between him and Joseph W. Ayers, in repair, in that he had failed to rebuild the cattle barn, after it had been destroyed by fire, in consequence of which

the appellants were compelled to abandon and cease operating their dairy business for want of a place, in which to care for their cattle, and thereby had suffered great loss of profits, which they would have made in the business. It must be pointed out that, if it be true, that Surface failed to carry out an obligation which he assumed in a contract between him and the appellant Joseph W. Ayers, from which damages resulted, that this damage could not be regarded as a failure of the consideration of the notes which were for payment of the purchase price of personal property purchased by the appellants. It is also evident, that any damages which may have resulted from a failure of Surface to rebuild the barns in question, (assuming that he was obligated to do so) could not legally be utilized, as a matter of offset or recoupment against the amount claimed to be due upon the notes in question. Such damages if any, could only be recovered by the party to

the contract, namely Joseph W. Ayers, as an individual claim, and could not therefore be recouped or offset against the joint indebtedness of the appellants set forth in the declaration. Priest v. Dodsworth 235 Ill. 613. Moreover the agreement to repair, whatever may be its legal scope, was made for the benefit of the business of the original partnership between Surface and Joseph W. Ayers; it does not carry by its terms, or by implication, any obligation to repair for the business of a partnership subsequently formed, and between other parties.

It is also contended by the appellants, that under the written contract entered into between Surface and the appellants on June 11, 1919, by which Surface transferred and assigned all his interest in the partnership, and his interest in the property of the partnership, with certain exceptions, which agreement provides also, that the appellants are to vacate the premises, and deliver possession of the same to Surface, on or before March 1,

1920, by implication transferred to appellants the right to use the cattle barn in question to the date mentioned. Assuming that this implication may properly be drawn from the terms of the contract, the right to use the cattle barn for the partnership business of the appellants would not carry with it the obligation to restore the cattle barn in case it was destroyed, and there is nothing in the assignment contract referred to, which in express terms, or by necessary implication, obligates Surface to restore the cattle barn in case of its destruction.

For the reasons stated, we are of opinion, that the matters set up in the pleas, do not show a failure of consideration for the notes involved, nor could these matters legally constitute a setoff or recoupment against a recovery on the notes, and do not therefore constitute a legal defense to plaintiff's right to recover on the notes. The demurrer was properly sustained to the pleas, and the judgment rendered is affirmed.

Judgment affirmed.

6928

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

223 I.A. 630

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Judson S. Joslyn,
Appellee,
vs.
Estate of Horace Stocking, deceased,
Appellant.

Appeal from Ogle.

DIBELL, P.J.

On March 30, 1920, Judson S. Joslyn filed in the county court of Ogle County a claim against the estate of Horace Stocking, deceased, in the sum of $1,795.10. The claim was tried and disallowed in that court and claimant appealed to the circuit court, where a jury was waived and the cuase was tried and the claim was allowed as of the 6th class in the sum of $1,265.82. The estate appeals.

The undisputed facts in this case are as follows. Judson S. Joslyn, Horace Stocking and Dexter Stocking, were equal owners of three pieces of real estate in Rockford. On January 19, 1912, they executed an instrument by which they provided that the title to the property should be vested in Horace Stocking in trust and that the trustee should collect the rentals and interest from the property, pay all taxes, insurance, interest on mortgage indebtedness and other expenses incident to the proper management of the property and, if such income did not pay such expenses, each party should contribute his share of the deficiency when requested by the trustee; it made it the duty of the trustee to sell and convey the property and collect the consideration and divide the net proceeds equally between the said three parties; that, if Horace Stocking should die before the trust was terminated

Judson S. Josiyn,
Appellee,
vs.
Estate of Horse Stocking,
deceased,
Appellant.

Appeal from Ogle.

DISSENT, P.J.

On March 30, 1920, Judson S. Josiyn filed in the county court of Ogle County a claim against the estate of Horse Stocking, deceased, in the sum of $1,955.10. The claim was tried and disallowed in that court and claimant appealed to the circuit court, where a jury was waived and the cause was tried and the claim was allowed as of the 5th class in the sum of $1,355.85. The estate appeals.

The undisputed facts in this case are as follows. Judson S. Josiyn, Horse Stocking and Dexter Stocking, were equal owners of three pieces of real estate in Rockford. On January 19, 1918, they executed an instrument by which they provided that the title to the property should be vested in Horse Stocking in trust and that the trustee should collect the rentals and interest from the property, pay all taxes, insurance, interest on mortgage in effect and other expenses incident to the proper management of the property, and if such income did not pay such expenses, then Dexter Stocking should contribute his share of the deficiency. The trustee; it made it the duty of the trustee to [illegible] the property and collect the [illegible] proceeds equally between the said three parties; that, if

Joslyn should be successor in trust, clothed with all the authority given to the trustee. It contained other provisions. Across the last page of this agreement these words were written: "Assigned to secure $4,000. note made to Horace Stocking this date, Feb. 7, 1914. Judson S. Joslyn." Stocking sold one portion of the premises to one Hoffman and apparantly divided the proceeds. The sale to Hoffman was before the date of said endorsement on the contract; and apparently the proceeds of that sale were distributed or at least received by the trustee, before the date of the $4,000 note. On June 3, 1914, Horace Stocking sold to William J. Leay and wife by contract for a deed a second piece of said real estate for $7,500, of which $500. was cash in hand and $500. was to be paid each first of July thereafter till all was paid. Said Payments bore interest at 6%. In December, 1916, Horace Stocking conveyed the premises to Leay and wife and received back a purchase money mortgage for $3,500. securing a note for that amount due five years after date, with interest at 6% per annum, payable semi-annually, the interest being eveidenced by coupon notes. Although said note was due five years after date, yet it was paid and the mortgage released in May, 1918/ On December 15, 1914, Joslyn gave to Horace Stocking his note for the sum of $1,333.34, due one year after date, with interest at 6% per annum payable semi-annually. The note stated that it was secured by an assignment of his interest in the trust agreement first above described as to that part of the land which had not been sold and conveyed. Horace Stocking died April 26, 1919. Thereafter Joslyn acted as trustee as to the land not yet sold and though he answered a question to the effect that he had sold it, yet he also showed that he was collecting rents from that remaining property. Horace Stocking left a will which appointed

Dexter Stocking and another executors. The contents of that will are not in this record. The evidence clearly shows that Joslyn paid in full to the estate said note for $1,333.34. This claim against the estate of Horace Stocking, deceased, is to recover the share Joslyn had in the proceeds of said note of $3,500, given by Leay and wife and paid in the lifetime of Horace Stocking. The accounting by Joslyn as succeeding trustee is evidently not due to the estate of Horace Stocking, but to those who take this unsold land under his will.

In order to recover his share of said proceeds of the Leay note, it was necessary that he prove that he had paid the $4,000 note above descfibed. He did not claim to have paid it after Horace Stocking died. He was not a competent witness to prove its payment to Horace Stocking in the lifetime of the latter, if objection was made thereto. On page 2 of the abstract near the beginning of the testimony of claimant occurs the following: "Testimony of the witness as to any matter before the death of Horace Stocking, objected to as incompetent. Objection as to events before the death sustained." As this case was not tried by a jury, if the foregoing from the abstract is correct, it must be understood that the court treated as incompetent all evidence by Joslyn as to matters occuring in the lifetime of Horace Stocking. But that part of the abstract is not supported by the record. The record showed that Joslyn was called as the first witness after certain exhibits had been introduced and was examined at some length without any objection. He was then asked to look at certain exhibits and asked if he had ever seen all of them before. An attorney for the estate objected "to the incompetency of Mr. Joslyn as a witness in his own behalf." The court said

that the executors were defending in their representative capacity. An attorney for claimant said "subsequent to the death." The court said "If it is anything that transpired subsequent to the death of Horace Stocking," and an attorney for claimant said he would make the witness competent before he got through. No ruling was made and at a later stage in the examination and apparently referring to this subject, the court said: "I haven't ruled on that yet." We conclude that the estate did object generally to the competency of claimant and that the court did not rule upon that objection but reserved it. The objection, however, was not well taken because it applied to all the testimony of claimant, and he testified to many matters occuring after the death of Horace Stocking and as to which he was competent. Before the close of claimant's direct examination he was asked if he had ever received any part of the principal or interest of the Leay note since the death of Horace Stocking, and he replied not that he knew of, and that he was certain that he would know if he had received it. He was then asked if he had ever received any part of it, and he answered no, and he was asked if he was at that time indebted to the estate of Horace Stocking in any way that he knew of, and he answered no. Claimant was called in rebuttal and was examined upon matters upon which he was competent, and upon cross examination for the estate he was asked if he made an assignment of his interest to the amount of said $4,000 note and admitted it. On re-examination by his counsel he stated that that indebtedness was all paid to Mr. Stocking before he died, and that his last payment (which referred to his check to the executor paying the balance on the note for $1,333.34) cleaned up the assignment. No objection was interposed at that stage of the examination. No

one testified any further about the $4,000 note. Joslyn produced cancelled checks for all other payments made by him. The payments made by Leay on the contract before the conveyance to him and purchase money mortgage for $3,500. seems to have been distributed. It seems impossible that Horace Stocking would pay that money to Joslyn while he held the $4,000. note. In ordinary business conduct he would apply Joslyn's share of the first payments made by Leay on the $4,000 note which was secured by an assignment of Joslyn's interest in the entire property. So, too, when the $3,500 note was paid by Leay, he would be likely to apply Joslyn's interest in that money upon the $4,000 note. When it appears that Joslyn shows cancelled checks for every other payment, and does not show how he paid the $4,000 note, the reasonable probability is that it was satisfied in part by Joslyn's share of the money paid on the $3,500 Leay note. Joslyn did not produce the $4,000 note and it may very well be that there are endorsements upon it that would explain how it was paid. If the $4,000 note had been paid by Joslyn before the Leay note was paid, it is strange that with his share of that money not paid to him, he should soon after give Horace Stocking his note for $1,333.34. We conclude that we ought to so protect the estate of Horace Stocking as to require the time and manner of satisfaction by claimant to Horace Stocking of said $4,000 note to be shown more fully than this record discloses. If the objection to the competency of ~~Horace Stocking~~ Judson D. Joslyn as a witness in his own behalf was taken under advisement by the court, it should have been sustained and we must treat it as sustained, and then there is no competent proof in this record that that $4,000 was paid except unsatisfactory inferences. Until it is paid and its lien upon this trust fund extinguished, claimant cannot recover. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

_____

Clerk of the Appellate Court.

6906

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

223 I.A. 660

BE IT REMEMBERED, that afterwards, to-wit: on NOV 2 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6909

No. 12

The Globe & Rutgers Fire Insurance Company, Plaintiff in Error, vs. The Illinois Oil Company of Rock Island, Defendant in Error.	Writ of Error to the Circuit Court of Rock Island County.

PARTLOW, J.

Plaintiff in error, the Globe & Rutgers Fire Insurance Company, began an action of assumpsit in the circuit court of Rock Island county against the defendant in error, the Illinois Oil Company of Rock Island, Upon a trial by jury there was a verdict for defendant in error and to review the judgment rendered on the verdict a writ of error has been prosecuted from this court.

On December 1, 1916, plaintiff in error issued a policy of insurance to defendant in error on several oil tanks situated in Oklahoma. The policy contained a recital that each of the tanks was constructed of steel with steel roofs. Subsequently a fire loss occured and it was claimed that three of the tanks did not have steel roofs as provided in the policy. A dispute arose over settlement of the loss on account of these three tanks being without steel roofs and negotiations for a settlement were commenced. Porter and Hoffman, who were insurance brokers, were actively engaged in conducting these negotiations. Each party denies that Porter and Hoffman were their agents. Wagner and Glidden acted as adjusters and the total loss was fixed by them at $13,356.93. It is claimed that there was a settlement but there is a sharp conflict in the evidence as to its terms.

Adolph F. Hoffman, one of the brokers, testified that he had a conversation in the Hotel Tulsa, in Tulsa, Oklahoma, with Frank P. Welch, the president and general manager of the defendant

The Globe & Rutgers Fire Insurance Company,

Plaintiff in Error,

vs.

The Illinois Oil Company of Rock Island,

Defendant in Error.

Writ of Error to the Circuit Court of Rock Island County.

PARTLOW, J.

Plaintiff in error, the Globe & Rutgers Fire Insurance Company, began an action of assumpsit in the circuit court of Rock Island county against the defendant in error, the Illinois Oil Company of Rock Island. Upon a trial by jury there was a verdict for defendant in error and to reverse the judgment rendered on the verdict a writ of error has been prosecuted from this court.

On December 3, 1918, plaintiff in error issued a policy of insurance to defendant in error on property described in Oklahoma. The policy contained a provision that [illegible] was continuing of equal validity [illegible] loss occurred and it was stated that [illegible] have equal rights in the policy. A fire [illegible] settlement of the loss in accordance [illegible] out steel roofs and [illegible] Porter and Hoffman, who were [illegible] engaged in conducting [illegible] Porter and Hoffman were [illegible] adjusters and the total [illegible] is claimed that there was [illegible] Pilot in the evidence [illegible].

Adolph R. McCann, [illegible] be had a conversation [illegible] Frank P. Welch, the president and general manager of [illegible]

in error, in which it was agreed that plaintiff in error should pay the full loss amounting to $13,356.92 and that defendant in error would pay the difference between the premium charged on the original policy of insurance and the amount of premium which would have been charged had the three tanks had steel roofs, which difference in premium amounted to $1250.00, and, in addition to paying the difference in premium, the defendant in error agreed to again insure its property with the plaintiff in error. Hoffman is not corroborated in this respect by any other witness.

On the other hand Frank P. Welch testified that he had a conversation with Hoffman, in Tulsa, in the presence of William F. Bowen and Walter A. Rosenfield, in which it was agreed that plaintiff in error would pay the full loss amounting to $13,356.92 provided the defendant in error would give plaintiff in error an additional two years insurance on the property at the rate of $1.75. He is corroborated in this by Bowen and Rosenfield.

On December 12, 1917, a check for $13,356.92 sent by plaintiff in error through Hoffman to defendant in error was cashed by the defendant in error. A demand was made on defendant in error for the $1250 additional premium on the original policy of insurance as testified to by Hoffman; also for $364.38 for what is known as a binder, that is for premium on insurance under a temporary contract, pending the issuance of a policy. Defendant in error refused to pay either of these amounts and this suit was begun.

Several reasons are urged why the judgment of the trial court should be reversed but none of them are argued by plaintiff in error. Counsel has seen fit to merely state the grounds without presenting their view thereon.

At the close of plaintiff in error's evidence and again at the close of all the evidence, a motion was made to direct a verdict for plaintiff in error. The refusal so to do is assigned

verdict for plaintiff in error. The refusal so to do is assigned
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presenting their view to jury.

At the close of plaintiff in error's case and again
in error refused to pay either of the counts in the suit pro-
ceeding.

Several reasons are urged by the judge of the trial
court should be severed but none of them are sufficient to
in error. Counsel has a right to clearly write in Grounds without
known as a binder, that is for policies on insurance under a tempo-
rary contract, pending the issuance of a policy. Defendant in
insurance as testified to by Hoffman; also for $2 1.02 for what is
in error for the $1850 additional premium on the original policy of
caused by the defendant in error. A demand was made on defendant
plaintiff in error through Hoffman to [illegible] in error was

On December 18, 1917, a check for $10,356.82 sent by
He is corroborated in this by Bowen and Rosenfield.

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error would pay the difference between the premium charged on the
pay the full loss amounting to $10,356.82 and that defendant in
in error, in which it was stated that plaintiff in error should

as error, especially as to $1350.00 on the ground that a settlement was made and there was an accord and satisfaction. In support of this contention it is claimed that if the check was sent in full payment and conditions were attached to this check, that the sending of the check and the accompanying conditions constituted an offer of accord and satisfaction, and the receipt of the conditions and appropriation of the money constituted the acceptance of the contract. For this reason it is urged there was no question of fact for the jury as to liability on the $1350 item, but it was a question of law for the court and the court should have directed a verdict. In support of these contentions several cases involving accord and satisfaction are cited, including Ennis v. Pullman Palace Car Co. 165 Ill. 161; Snow v. Griesheimer, 220 Ill. 107; Canton Coal Co. v. Parlin, 215 Ill. 244.

If the facts in the case at bar were not in dispute but were like the cases cited there would be merit in the contention of the plaintiff in error. Where a check is sent in full payment and conditions are attached, the sending of the check with the accompanying conditions constitute an offer of accord and satisfaction, and the receiving of the check and cashing the same constitute the acceptance and a contract is thereby affected. Plaintiff's contentions as to such an accord and satisfaction are disputed in this record. It is undisputed that some kind of a settlement was made at Tulsa, Oklahoma. Four persons were present at the settlement. One of them testified to the settlement as contended by plaintiff in error, the other three testified in support of the claim of settlement of the defendant in error. If Hoffman had full power and authority from the plaintiff in error and acting as its agent, entered into a valid and binding contract with Welch, as the agent of defendant in error, at Tulsa, Oklahoma, in which contract it was agreed that the plaintiff in error was to pay the loss in full on condition that the defendant in error should again insure its

on condition that the defendant in error should again insure its agent of defendant in error, at Tulsa, Oklahoma, in which contract it was agreed that the plaintiff in error was to pay the loss in full power and authority from the plaintiff in error [illegible] as its agent, entered into a valid and binding contract with Wilson, as the claim of settlement of the defendant in error. It [illegible] full plaintiff in error, the other three testified [illegible] out of the ment. One of them testified to the settlement [illegible] by made at Tulsa, Oklahoma. Four persons were present at the settle- this record. It is undisputed that some kind of a settlement was conditions as to such an accord and satisfaction. Implanted in the acceptance and a contract is thereby effected. Plaintiff's tion, and the receiving of the check and cashing the same constitute conspiring conditions constituted an offer of accord and satisfac- and conditions are attached, the sending of the check with the se- of the plaintiff in error. Where a check is sent in full payment were like the cases cited there would be merit in the contention Coal Co. v. Parish, 215 Ill. 344.

It the facts in the case at bar were not in dispute but Car Co. 166 Ill. 181; Brow v. Griesheimer, 230 Ill. 107; Cannon accord and satisfaction are cited, involving Ennis v. Pullman Palace verdict. In support of these contentions several cases involving question of law for the court and the court should have directed a for the jury as to liability on the $1250 item, but it was a tract. For this reason it is urged that there was no question of fact approbation of the money constituted the acceptance of the con- of accord and satisfaction, and the receipt of the conditions and of the check and the accompanying conditions constituted an offer payment and conditions were attached to this check, that the sending this contention it is claimed that if the check was sent in full as error, especially as to $1250.00 on the ground that a settlement was made and there was an accord and satisfaction. In support of

property with plaintiff in error for two years, then all of the parties to that contract were bound by its terms and had the right to rely upon that contract and to have it enforced. Under such conditions neither the plaintiff in error nor Hoffman had any right to substitute other terms or conditions for the ones contained in the contract. Hoffman in a letter of December 5, 1917, stated that plaintiff in error had agreed to pay the loss in full on the basis of increasing the rate on the present insurance policies to $3.70 , making an additional premium of $1250, together with continuing insurance for two years. On December 11, 1917, Welch replied to this letter denying that any such agreement was made. The draft for the full amount of the loss was dated December 12, 1917, and had no conditions attached to it. On December 13, 1917, Hoffman sent this draft to defendant in error, together with a letter in which he stated that the settlement was based on an additional premium, and requested a check for the same. The mere statement of Hoffman in the letter containing the draft that the settlement was on a 3% basis and requesting a check for the balance did not alone and of itself bring the facts of this case within the rule as to accord and satisfaction announced in the cases cited by plaintiff in error. The terms of the contract, and the question of the authority and the agency of Hoffman were in dispute. These were not questions of law for the court, but were disputed questions of fact for the jury to determine, and the court committed no error in refusing to direct a verdict upon the question of the additional premium claimed to be due.

As to the $364.68 for binder insurance, plaintiff in error contends that there was no dispute as to this part of the contract, that it was part of the terms of settlement, the amount was not disputed and the court should have directed a verdict.

It is not claimed by plaintiff in error that any written

property with plaintiff in error for two years, then all of the parties to that contract were bound by its terms and had the right to rely upon that contract and to have it enforced. Under such conditions neither the plaintiff in error nor Hoffman had any right to substitute other terms or conditions for the ones contained in the contract. Hoffman in a letter of December 3, 1917, stated that plaintiff in error had agreed to pay the loss in full on the basis of increasing the rate on the present insurance policies to $3.00, making an additional premium of $1800, together with continuing insurance for two years. On December 11, 1917, which replied to this letter denying that any such agreement was made. The draft for the full amount of the loss was dated December 12, 1917, and had no conditions attached to it. On December 13, 1917, Hoffman sent this draft to defendant in error, together with a letter in which he stated that the settlement was based on an additional premium, and requested a check for the same. The mere statement of Hoffman in the letter containing the draft that the settlement was on a 3% basis and requesting a check for the balance did not, in any of these ways bring the facts of this case within the rule as to accord and satisfaction announced in the cases cited by plaintiff in error. The terms of the contract, and the powers of the agency of Hoffman were in dispute. There was no question of the law for the court, but were disputed facts to be submitted to a jury to determine, and the court committed no error in refusing to direct a verdict upon the question of the additional premium claimed to be due.

As to the $334.68 for binder insurance, plaintiff in error contends that there was no dispute as to this item. The contract that it was part of the terms of verbal agreement, the jury who were disputed and the court should have directed a verdict.

It is not claimed by plaintiff in error that any written

policy or other writing was ever issued covering this binder insurance except as hereinafter stated, and we hold under authority of Cottingham v. Nat. Church Ins. Co. 290 Ill. 27, no writing was necessary. John D. Lester, assistant secretary of the plaintiff in error, testified that the plaintiff in error issued a binder which was given number 237960½, that it was issued to defendant in error for Two Hundred Thousand Dollars, was in force from December 31, 1917, to February 7, 1918, and that Porter and Hoffman took the binder with them. Hoffman testified that the binder he ordered had no particular number on it. Welch wrote to Hoffman to the effect that a letter had been received from Hoffman stating that Porter and Hoffman had covered defendant in error's property in the sum of Two hundred thousand dollars and he asked for information concerning the same. Welch wirdd once or twice to plaintiff in error about the binder covering defendant in error's property. One time he received a reply and was referred to Porter and Hoffman and the other time he received no reply. The binder was only for temporary insurance pending the issuance of a policy. The check in settlement was sent December 12, the binder was not issued until December 31, and while it was only intended to be temporary it was permitted to remain in force and effect according to plaintiff in error until February 7, 1918. Under this condition of the evidence it was a question of fact for the jury as to whether or not a binder was in fact issued, what company issued it, what property it covered; how long it was in force, its amount and the premium, and for these reasons the trial court did not err in refusing to direct a verdict for this item.

Complaint is made of the refusal of the trial court to permit the witness Lester to detail a conversation between Hoffman and Candee, vice president of the plaintiff in error. This conversation was out of the presence of defendant in error and as the proof

policy or other writing was ever issued covering this binder insurance exceptas hereinafter stated, and we hold wuld r authority of Cottingham v. Nat. Church Ins. Co. 290 Ill. 27, no writing was necessary. John D. Lester, assistant secretary of the plaintiff in error, testified that the plaintiff in error issued a binder which was given number 837980, that it was issued to defendant in error for Two Hundred Thousand Dollars, was in force from December 31, 1917, to February 7, 1918, and that Porter and Hoffman took the binder with them. Hoffman testified that the binder he ordered had no particular number on it. Welch wrote to Hoffman to the effect that a letter had been received from Hoffman stating that Porter and Hoffman had covered defendant in error's property in the sum of Two Hundred thousand dollars and he asked for information concerning the same. Welch wrote once or twice to plaintiff in error about the binder covering defendant in error's property. One time he received a reply and was referred to Porter and Hoffman and the other time he received no reply. The binder was only for temporary insurance pending the issuance of a policy. The object in writing was sent December 12, the binder was not issued until December 31, and while it was only intended to be temporary it was permitted to remain in force and effect according to [illegible] until February 7, 1918. Under this condition o[illegible] the evidence it was a question of fact for the jury as to whether or not a binder was in fact issued, what company issued it, what property it covered; how long it was in force, its amount and the premium, and for these reasons the trial court did not err in refusing to direct a verdict for this item.

Complaint is made of the refusal of the trial court to permit the witness Lester to detail a conversation between Mr. Hoffman and Candee, vice president of the plaintiff in error. This conversation was out of the presence of defendant in error and the proof

ddid not show that Hoffman was the agent of defendant in error the evidence was properly excluded.

The Plaintiff in error complains that the witness Quayle was permitted to testify that no policy or document was issued to evidence the binder insurance. Upon examination we find that Quayle did not so testify but he did testify that no policy or binder was ever received by defendant in error. While it is true that no policy need be issued to render the insurance binding, yet there must be some evidence upon which a liability could be based. We see no error in the evidence admitted.

The fifth instruction given by the court told the jury that if they believed from a preponderance of the evidence that the plaintiff made and sent to Porter & Hoffman its check for $13,356.92 as the same appeardd in evidence, without the endorsements thereon, and that Porter & Hoffman transmitted said check to the defendant and enclosed with said check a letter imposing certain conditions upon the acceptance of said check by defendant, then the defendant would be bound to accept said conditions in case they accepted said check; provided thejury believed from a preponderance of the evidence that Porter & Hoffman were the authorized agents of plaintiff in imposing said conditions.

The only objection to this instruction by plaintiff in error is that it was highly prejudiced to instruct the jury that before the plaintiff could recover it must show that Hoffman was the authorized agent of plaintiff in error to impose said conditions. The evidence shows that negotiations of settlement were made by Hoffman. In order to bind plaintiff in error he must have been the authorized agent of plaintiff in error and that element was properly contained in the instruction.

Objection is made to the first and fourth instructions in which it is urged that the court improperly told the jury that

did not show that Hoffman was the agent of defendant in error the evidence was properly excluded.

The Plaintiff in error complains that the witness Qualle was permitted to testify that no policy or document was issued to evidence the binder insurance. Upon examination we find that Qualle did not so testify but he did testify that no policy or binder was ever received by defendant in error. While it is true that no policy need be issued to render the insurance binding, yet there must be some evidence upon which a liability could be based. We see no error in the evidence admitted.

The fifth instruction given by the court told the jury that if they believed from a preponderance of the evidence that the plaintiff made and sent to Porter & Hoffman the check for $15,000.00 as the same appeared in evidence, without the endorsements thereon, and that Porter & Hoffman transmitted said check to the defendant and enclosed with said check a letter implying certain conditions upon the acceptance of said check by defendant, then the defendant would be bound to accept said conditions in case they not first said check; provided the jury believed from a preponderance of the evidence that Porter & Hoffman were the authorized agent [illegible] of plaintiff in imposing said conditions.

The only objection to the instruction by plaintiff in error is that it was highly prejudicial to instruct the jury that before the plaintiff could recover it must show that Hoffman was the authorized agent of plaintiff in error to impose said conditions. The evidence shows that negotiations of any kind were made by Hoffman. In order to bind plaintiff in error we must have been the authorized agent of plaintiff in error and the jury was properly controlled in the instruction.

Objection is made to the third and fourth instructions in which it is urged that the court improperly told the jury that

a binder was a document. As we have before said a binder does not have to be a writing or a document and the first instruction did not so state, but the fourth instruction defines a binder as a document. This definition is in accordance with the evidence in thecase. James D. Lester, a witness for plaintiff in error, stated that plaintiff in error issued its binder which was given the number 237960½ and that Porter and Hoffman took the binder with them. Hoffman testified that the binder had no particular number. What this binder consists of or what evidence there was of its existence does not appear from the evidence but if it had a number and was delivered to Hoffman, it certainly did not consist of an oral contract of insurance and the instruction was in accordance with the evidence.

We find no reversible error and the judgment is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

_____

Clerk of the Appellate Court.

6936

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

223 I.A. 661

BE IT REMEMBERED, that afterwards, to-wit: on NOV 2 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

John Harrison, Appellee	)	Appeal from the Circuit Court of McHenry County.
vs.	)	
Julia P. Herrington, Appellant.	)	

Partlow, J.

Appellee, John Harrison, obtained a judgment for $480.00 in the circuit court of McHenry county against the appellant, Julia P. Herrington as a commission for the sale of real estate and this appeal was prosecuted.

Appellant contends that the evidence does not support the verdict. It is undisputed that, in March, 1918, appellant placed 400 acres of her land in the hands of appellee for sale, and that on February 21, 1919, she entered into a contract of sale with Fern Rogers for 160 acres in the center of the farm. She afterwards entered into another contract with Rogers for another 160 acres, and later sold him the remaining 80 acres. She claims that all of these sales were made through William Douglas, her confidential advisor and agent, after appellee had informed her that he would make no further efforts to sell the land.

The evidence consists of the testimony of appellant, appellee and Douglas. Appellee testified that, in March, 1918, he had a conversation with appellant at her home in Woodstock. She asked him what he thought her land was worth. He told her it was worth $150.00 per acre and she told him to sell it at that price and she would pay him two per cent commission. He then went to Fern Rogers, her tenant, and had a talk with him about the place.

John Harrison,

Appellee

vs.

Julia P. Herrington,

Appellant.

Appeal from the Circuit Court of McHenry County.

Partlow, J.

Appellee, John Harrison, obtained a judgment for $480.00 in the circuit court of McHenry county against the appellant, Julia P. Herrington as a commission for the sale of real estate and this appeal was prosecuted.

Appellant contends that the evidence does not support the verdict. It is undisputed that, in March, 1918, appellant placed 400 acres of her land in the hands of appellee for sale, and that on February 21, 1919, she entered into a contract of sale with Fern Rogers for 160 acres in the center of the farm. She afterwards entered into another contract with Rogers for another 160 acres, and later sold him the remaining 80 acres. She claims that all of these sales were made through William Douglas, her confidential advisor and agent, after appellee had informed her that he would make no further efforts to sell the land.

The evidence consists of the testimony of appellant, appellee and Douglas. Appellee testified that, in March, 1918, he had a conversation with appellant at her home in Woodstock. She asked him what he thought her land was worth. He told her it was worth $130.00 per acre. He also told him to sell it at that price and she would pay him two per cent commission. He then went to Fern Rogers, her tenant, and had a talk with him about the place.

Rogers said he would not pay $150.00 because hw could get it for $125.00. He had another talk with Rogers in May, 1918, and told Rogers that if he would buy for $150.00 an acre that a road would be put through the farm that would increase its value, and Rogers told him he would buy if the road could be put through. Nothing more was done for two or three months. Appellee examined the records of the township to see what had been done on several other occasions when attempts had been made to open this road. In the early fall or winter of 1918, a month or six weeks before the farm was sold to Rogers, he again saw Rogers who told him that he had just about decided to buy the farm, but was afraid he could not get the road. Appellee said he would do his best to get the road and thought it could be secured. Appellee testified that he saw the commissioners of highways and secured an attorney to draw a petition for the road and the petition was presented to the commissioners who refused to grant it. An appeal was prayed to the county superintendent of highways but the road had not been opened because the township had no money with which to pay the damage. He also testified he did not go with Rogers at the time the contract to sell was made, because there had been so much opposition over the road he was afraid some one might see him and think he was acting for personal reasons. In March, 1920, he talked with the appellant and told her that he sold the farm to Rogers on account of laying out the road and that he was entitled to his commission, and she told him she did not think so because Mr. Douglas sold the farm.

Appellant testified to the making of the contract of sale with appellee. In May, 1918, she said that appellee

Rogers said he would not pay $150.00 because he could get it for $125.00. He had another talk with Rogers in May, 1918, and told Rogers that if he would buy for $150.00 an acre that a road would be put through the farm that would increase its value, and Rogers told him he would buy if the road could be put through. Nothing more was done for two or three months. Appellee examined the records of the township to see what had been done on several other occasions when attempts had been made to open this road. In the early fall or winter of 1918, a month or six weeks before the farm was sold to Rogers, he again saw Rogers who told him that he had just about decided to buy the farm, but was afraid he could not get the road. Appellee said he would do his best to get the road and thought it could be secured. Appellee testified that he saw the commissioners of highways and secured an attorney to draw a petition for the road and the petition was presented to the commissioners who refused to grant it. An appeal was prayed to the county superintendent of highways but the road had not been opened because the township had no money with which to pay the damage. He also testified he did not go with Rogers at the time the contract to sell was made, because there had been so much opposition over the road he was afraid more one might see him and think he was acting for personal reasons. In March, 1920, he talked with the appellant and told her that he sold the farm to Rogers on account of laying out the road and that he was entitled to his commission, and she told him she did not think so because Mr. [illegible] sold the farm.

Appellant testified to the making of the contract of sale with appellee. In May, 1918, she said that appellee

came to see whether she would take a little less money. She wanted $165.00 net per acre for the 160 acres and $150.00 net per acre for the balance and refused to take any less. The last time she talked with appellee was January 17, 1919, on the east side of the public square in Woodstock, when appellee said he had no prospects for sale. Farms were not selling and he said he would give up trying to sell the place. This last part of her testimony is denied by appellee. She testified that she had no further talk with appellee until March, 1920, when he claimed the commission; that the sale was made through Mr. Douglas and that appellee had nothing to do with it.

William Douglas testified that he made the sale to Rogers. He first talked to Rogers about it in February, 1919; that appellee had nothing to do with the transaction. Rogers was not called as a witness by either side, but the record shows that a subpoena was issued for him by appellee but he could not be found on the day of the trial.

Appellant claims she did not give appellee the sole right to sell this land. The law is that the principal may employ several brokers to sell the same property, and where the land is sold to the buyer who was first procured by any of them the principal will not be liable to other brokers who were not the procuring cause of the sale. Day v. Porter, 161 Ill. 235. If the broker abandons all efforts to sell, the principal without liability may make the sale. West End Dry Goods Co. vs. Maun, 133 Ill. App. 544. It is only where the broker is the procuring cause of the sale that he is entitled to the commission, but where he is the procuring cause the principal and the

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customer cannot collude and excape paying the commission. Hafner vs. Herron, 165 Ill. 242; Rigdon vs. More, 226 Id. 382.

There is no dispute concerning the original contract between appellant and appellee. Appellant contends that this contract was terminated before the sale and that appellee was not the procuring cause. These were purely questions of fact for the jury. It was for the jury to say whose evidence they would believe. They saw fit to believe the evidence of appellee. We will not disturb the verdict unless it is clearly against the weight of the evidence. People vs. Mayor of Alton 209 Ill. 461. It is not contradicted that appellee took active steps to lay out the road. If he had not done so that fact could easily have been shown. He would have no apparent interest in the road unless he was trying to sell the land. The time taken to have a hearing on his petition might explain some of the delay. We have read the evidence with considerable care and cannot say that the verdict is contrary to the evidence.

The appellant and appellee had some conversation relative to submitting their controversy to Mr. Jewett of Woodstock for settlement. The appellee was asked upon the trial, the following question; "Was it settled on Mr. Jewett's say-so?" Over objection he answered, "It was not." He was then asked if he was "willing to settle on Mr. Jewett's say-so?" and over objection, he answered: "I was willing to settle on Mr. Jewett's judgment." It is objected that these questions assume that Mr. Jewett had expressed an opinion in regard to the merits of the controversy and the answers tend to

customer cannot collude and escape paying the commission. Herner vs. Herron, 166 Ill. 242; Rigdon vs. Lore, 220 Id. 382.

There is no dispute concerning the original contract between appellant and appellee. Appellant contends that this contract was terminated before the sale and that appellee was not the procuring cause. These were purely questions of fact for the jury. It was for the jury to say whose evidence they would believe. They saw fit to believe the evidence of appellee. We will not disturb the verdict unless it is clearly against the weight of the evidence. People vs. Mayor of Alton 209 Ill. 461. It is not contradicted that appellee took active steps to lay out the road. If he had not done so that fact could easily have been shown. He would have to appear interest in the road unless he was trying to sell the land. The time taken to have a hearing on his petition might explain some of the delay. We have read the evidence with considerable care and cannot say that the verdict is contrary to the evidence.

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show that his decision was favorable to appellee. After those questions were asked and answered, the court permitted appellant to testify that she stated her case to Mr. Jewett and he did not arrive at any settlement or agreement. We do not think any of this evidence should have been admitted because it tends to show an attempted settlement or compromise, but we do not think its admission constitute reversible error.

Complaint is made that the court permitted the deputy sheriff to testify that on the morning of the trial a subpoena had been placed in his hands for Fern Rogers by appellee and that Rogers could not be found. We see no error in this evidence. Fern Rogers bought the land. His evidence might throw considerable light on the question at issue. He had been a tenant of appellant. Appellee testified to several conversations with him relating to the sale of the farm. If he could not be found and that was the reason why he did not testify, the court and jury had a right to know the reason for his absence, especially in view of the fact that his place of business was in the town near the court house and he had been in the court room during the term of court. It was not error to admit this evidence. Warth vs. Loewenstein 219 Ill. 222.

The fourth instruction told the jury that if they believed from the evidence, facts and circumstances proved on the trial that the plaintiff, John Harrison, was the procuring cause in the sale of a part of defendant's lands under the terms of an agreement, and if they believed there was an agreement between the plaintiff and defendant for the sale, and in such agreement the plaintiff was to be paid a commission, then

they were instructed that the plaintiff had a right to recover even though they might believe and did believe that the defendant employed Will Douglas and other persons to assist in making said sale, and that the said Will Dougles, or the defendant, or other persons, did assist in making such sale. The objection to this instruction is that there is no evidence that Douglas was employed by appellant to assist appellee in making the sale. The instruction, however, does not state that appellee employed Douglas to assist appellant. In fact it does not state who Douglas was employed to assist. The instruction is not very accurately drawn, is not clear in the language used, but does not constitute reversible error.

The tenth given instruction told the jury that when an agreement for the sale of property was entered into, the agent was entitled to his recompense if he succeeded in procuring a purchaser who was ready, able and willing to purchase, even though the owner and said purchaser did not follow the exact terms under which the property was listed with the agent. The objection to this instruction is that it does not require the broker to make known his purchaser to the seller. The instruction announces an abstract proposition of law that has been approved by the courts in many cases and in fact, under the evidence, was more favorable to the appellant than it should have been.

Objection is made to the refusal of the court to give the third, fourth, fifth and seventh instructions offered by appellee. The fourth instruction was covered by other instructions given, and the third, fifth and seventh

instructions did not state correct propositions of law and were properly refused.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

instructions did not state correct principles of law and were properly refused.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

_____

Clerk of the Appellate Court.

6953

21232

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

223 I.A. 667

BE IT REMEMBERED, that afterwards, to-wit: on NOV 2 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6955. Agenda #54.

A. L. Freed, Appellee,	)	
Vs.	)	Appeal from the City
Sinclair Refining Co., Appellant.	)	Court of Kewanee, Illinois.

Partlow, J.

Appellee, A. L. Freed, obtained a judgement for damages against the appellant, the Sinclair Refining Company, in the city court of Kewanee. To review that judgement this appeal was prosecuted.

The appellee was a monument dealer in the city of Kewanee and had a concrete platform on the north side of Second Street which extends east and west, and on the east side of an alley running north and south from Second Street, on which platform he exhibited his monuments. The alley adjoining the platform was paved with concrete and sloped gradually from the west toward the property of the appellee. The south end of the platform was about four inches above the alley with a gradual slope until the platform and alley were on a level at the north end of the platform. On the west side of the alley and opposite the platform was a Standard oil filling station and one entrance to the station was by way of the alley. On the day of the accident appellee had three Vermont granite monuments, each three feet wide, three feet high, one and one-half feet thick and weighing 1800 pounds, located eighteen inches apart on the platform and facing Second Street, the west monument being one foot from the alley line. They were on three dies and there was no fence, rail, guard or curb between the

alley and the monuments. It had been snowing and there was fresh snow on the ground. Appellant's Ford truck, without chains, drove into the alley, the rear end of the truck skidded, hit the monument next to the alley and this one knocked over the second and second knocked over the third, scarring and marking them. The case was tried before a jury and at the close of the appellee's evidence the appellant moved to instruct the jury to find the issues for the appellant, which motion was denied. The jury returned a verdict of $300.00 and judgement was rendered upon the verdict.

The first error urged is that the evidence does not show that appellant was guilty of any negligence but does show that appellee was guilty of negligence in placing valuable property on a prominent alley without guard or protection. The declaration contains one count and alleges general negligence.

In Wolff Manufacturing Company vs. Wilson, 52 Illinois, 9, on page I4, negligence is defined as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing something which a prudent or reasonable man would not do. In Hart vs. Washington Park Club, I57 Ill., 9, the question under consideration was whether the declaration sufficiently alleged the negligence of the defendant, and on page I5 it was said: "In Scott vs. Docks Company, 3 Hurl & C., 596, it was said by the court: "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things, does not happen if those, who have the management, use proper care, it affords reasonable evidence, in the absence of an

explanation by the defendant, that the accident arose over want of care." This passage was quoted with approval in North Chicago Street Railway vs. Cotton, 140 Ill., 486. In Addison on Torts (Volume I, Section 33), the rule is thus stated: "Where the accident is one which would not, in all probability, happen, if the person causing it was using due care, and the actual machine causing the accident is solely under the management of the defendant . . . the mere occurrence of the accident is sufficient prima facie proof of negligence to impose upon the defendant the onus of rebutting it." Upon this basis of these authorities the case of The William Branfoot, in 48 Fed., 914, holds, that "when an unusual and unexpected accident happens, and the thing causing the accident is in one's exclusive management, possession or control, the accident speaks for itself, is itself a witness res ipsa loquitur, and in a suit of anyone having an action therefor, the fact of the accident puts on the defendant the duty of showing that it was not occasioned by negligence on his part."

Appellant contends that appellee should have placed his monuments at such a distance from the alley that a car skidding could not strike them, or if he did put them so close to the alley line he should have protected them with a guard of some kind. The appellee owned all of the lot out to the street and alley line, He had a right to use the entire lot out to the line for any lawful purpose he might see fit. He was guilty of no negligence in placing his monuments within one foot of the alley line and was under no obligation to protect them by any kind of a guard. He was, therefore, not guilty of any negligence which in any way contributed to the accident.

On the other hand, when the driver of the truck drove into the alley, it was his duty to have his truck under such control that he would not injure appellee's property, taking into consideration all of the physical conditions surrounding the location. There was snow on the ground, the alley was paved and sloped to the east. These conditions were plainly visible to the driver of the truck. Under these circumstances the truck being under the exclusive control and management of the servants of the appellant was driving into the alley in such a manner that it skidded and struck a monument which weighed 1800 pounds with such force that it was knocked over . We know from common experience that it took considerable force to knock over a monument of that kind. The law does not impose upon anyone the duty of anticipating the negligence of another for it is presumed that all persons will conduct themselves with ordinary care and so as not to injure the property of another so long as the property is upon the private premises of the owner. Koepke vs. Chicago, Rock Island and Pacific Ry., 200 Ill. App., 247. The question of negligence was one of fact for the jury, and under the authorities above cited and under the evidence in this case, the negligence of the appellant is amply proved as charged in the declaration.

The third instruction on behalf of the appellee told the jury that the appellee had the right to use his own property and the whole of it to the line of the alley for any lawful purpose, and the defendant, by its servants, had no right to injure such property so located, whether the same was near the alley line or otherwise, and if the jury believed from the evidence that the monuments were located on the lands of the plaintiff and appellant, while in the course of their duty, drove a truck into the monuments and injured

them, as charged in the declaration, then they should find the appellant guilty. Complaint is made of this instruction, but it clearly states the law as we understand it, and while it is contrary to appellant's contention of the law, yet the court committed no error in giving it.

Counsel for appellee, in his closing argument, said that the instructions of the court, in his judgement, would be that if the appellee erected his monuments on his own lot and appellant ran into them with his truck, that this was evidence of negligence , and under this evidence appellant should be compelled to pay whatever damage was suffered. It is also insisted that counsel for appellee persisted in making improper remarks in reference to the failure of appellant to offer any evidence. and repeated these remarks after objection to them had been sustained; also he insisted that appellee was entitled to a verdict for interest.

The entire argument does not appear in the record and it is quite difficult to pass intelligently upon a few remarks selected here and there from the argument. The first statement with reference to the law was proper. The appellee was not entitled to interest and such claims should not have been made. The mere fact that appellant offered no evidence was no admission of liability. Counsel had a right to call attention to the fact that no evidence was offered on behalf of appellant and to draw all proper and reasonable conclusions therefrom, and he had no right to urge that such failure on the part of appellant to offer evidence was an admission of liability, and after objection was sustained to that remark it was the duty of counsel to refrain from repeating it. We think, however, that the verdict is clearly within the evidence and that no injury was

caused by such improper repetition.

We find no reversible error and the judgement is affirmed.

Judgement Affirmed.

caused by such improper repetition.

We find no reversible error and the judgment is affirmed.

Judgment AFFIRMED.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

6762

Certiorari denied

2/24/2

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

223 Ill. 663

BE IT REMEMBERED, that afterwards, to-wit: on NOV 3 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6962 Agenda 6C

David Lapsley,
Appellant
vs.
George Chatfield,
Appellee.

Appeal from the Circuit Court of Kankakee County.

Partlow, J.

Appellant David Lapsley, filed his bill in the circuit court of Kankakee county against the appellee, George Chatfield, for an accounting of partnership affairs. The cause was referred to the master who found there was $1601.83 due to the appellant from the appellee. Exceptions were filed to this report and upon a hearing those exceptions were sustained as to certain items and a decree rendered which found that there was due $659.78 from appellee to appellant. From that decree this appeal was prosecuted.

It is contended by appellant that there are twenty specific items which were either erroneously charged against him orfor which he should have received credit and each one of these items is argued separately.

The evidence shows that about March 1, 1903, appellant and appellee entered into a verbal contract of partnership for the buying and selling of livestock. This partnership continued for about five years, during which time no books of account were kept, but they settled their business transactions at the close of each deal. About March 1, 1908, they verbally agreed to enlarge their business and to include farming and ranching. They rented a farm, equipped it and carried on business on an extensive scale until about the

David Lapsley,

Appellant

vs.

George Chatfield,

Appellee.

Appeal from the Circuit Court of Kankakee County.

Partlow, J.

Appellant David Lapsley, filed his bill in the circuit court of Kankakee county against the appellee, George Chatfield, for an accounting of partnership affairs. The cause was referred to the master who found there was $1801.83 due to the appellant from the appellee. Exceptions were filed to this report and upon a hearing those exceptions were sustained as to certain items and a decree rendered which found that there was due $838.78 from appellee to appellant. From that decree this appeal was prosecuted.

It is contended by appellant that there are twenty specific items which were either erroneously charged against him or for which he should have received credit and each one of these items is argued separately.

The evidence shows that about March 1, 1903, appellant and appellee entered into a verbal contract of partnership for the buying and selling of livestock. This partnership continued for about five years, during which time no books of account were kept, but they settled their business transactions at the close of each deal. About March 1, 1908, they verbally agreed to enlarge their business and to include farming and ranching. They rented a farm, equipped it and c rried on business on an extensive scale until about the

first of March, 1916. Books of account from March 1, 1908, until the end of the partnership were kept by appellee. It is very apparent that these books were very crudely kept. Charges were not made at the time of the transactions. Items were not entered in their regular order and the books are apparently untrustworthy in many other respects.

The record in this case covers over 1200 pages and there has been no regularity in taking the evidence, but the evidence goes from one item to another without system. Almost a year and a half was consumed in taking the evidence. The books of account as kept by the appellee were offered in evidence and appeared in the record as Exhibits A, and B. The master states the account by first computing the totals of Exhibits A and B., then by making such additions and deductions therefrom as the evidence justifies. He stated the account of each party with the firm showing how much each one owed the firm outside of the partnership books, that is, what amount was due from each partner, which amounts were not carried on the books. He found the total receipts of A and B to be $121,804.40, and the total disbursements to be $121,988.21. He found that the appellee admitted indebtedness to the partnership amounting to $1401.50, a list of which was attached to his report. He found there should be deducted from the disbursements shown by Exhibits A and B, $988.54, being either improper charges or charges which had been duplicated. He found the appellee entitled to credit amounting to $2169.90, being itemized and attached to the report. He also found that the appellant should

first of March, 1916. Books of account from March 1, 1908, until the end of the partnership were kept by appellee. It is very apparent that these books were very crudely kept. Charges were not made at the time of the transactions. Items were not entered in their regular order and the books are apparently untrustworthy in many other respects.

The record in this case covers over 1800 pages and there has been no regularity in taking the evidence, but the evidence goes from one item to another without system. Almost a year and a half was consumed in taking the evidence. The books of account as kept by the appellee were offered in evidence and appeared in the record as Exhibits A, and B. The master states the account by first computing the totals of Exhibits A and B., then by making such additions and deductions therefrom as the evidence justifies. He stated the account of each party with the firm showing how much each one owed the firm outside of the partnership books, that is, what amount was due from each partner, which amounts were not carried on the books. He found the total receipts of A and B to be $[illegible], and the total disbursements to be $[illegible]. He found that the appellee admitted in evidence to the partnership amounting to $1401.80, a list of which was attached to his report. He found there should be deducted from the disbursements shown by Exhibits A and B, $838.54, [illegible] either improper charges or charges which had been duplicated. He found the appellee entitled to credits amounting to $1188.90, being itemized and itemized

be charged with $2180.49, of which $1764.49 was admitted by the appellant. The master went into detail as to many of the items which are included in his report, but most of theitems included in his report are contained in Exhibits A and B. The summary of the master's report is that there was $1601.83 due to the appellant from the appellee.

Upon a hearing of exceptions to this report the chancellor specifically passed upon seventeen items in which the report of the master was modified. These items amounted to $942.05 and were deducted from the amount found due by the master, leaving $659.78 due from appellee to the appellant. Each of these seventeen items deducted by the chancellor are argued separately by the appellant and it is urged that they were improperly deducted. On an appeal of this kind it is the duty of the appellant to present an abstract of the record in such a manner that the reviewing court can, from the briefs, arguments and abstract, ascertain whether or not the chancellor ruled properly. That has not been done in this case. There are over 1000 pages of evidence which have been condensed into an abstract of twenty pages. Only one page of the abstract has been, on an average, devoted to over fifty pages of the record, Our attention is not called to the various pages of the record where the evidence relative to these seventeen items in dispute may be found. We have gone through the abstract, briefs and arguments where references have been made and have attempted to ascertain the correctnss of the ruling of the chancellor, but it is impossible, from the manner in which this case

be charged with $2180.49, of which $1781.49 was remitted by the appellant. The master went into detail as to many of the items which are included in his report, but most of the items included in his report are contained in Exhibits A and B. The summary of the master's report is that there was $1801.83 due to the appellant from the appellee.

Upon a hearing of exceptions to this report the chancellor specifically passed upon seventeen items in which the report of the master was modified. These items amounted to $842.05 and were deducted from the amount found due by the master, leaving $958.78 due from appellee to the appellant. Each of these seventeen items deducted by the chancellor are argued separately by the appellant and it is urged that they were improperly deducted. On an appeal of this kind it is the duty of the appellant to present an abstract of the record in such a manner that the reviewing court can, from the brief, arguments and abstract, ascertain whether or not the chancellor ruled properly. That has not been done in this case. There are over 1000 pages of evidence which have been condensed into an abstract of twenty pages. Only one page of the abstract has been, on an average, devoted to over fifty pages of the record. Our attention is not called to the various pages of the record where the evidence relative to these seventeen items in dispute may be found. We have gone through the master's briefs and arguments where reference has been made and have attempted to ascertain the correctness of the ruling of the chancellor, but it is impossible, from the manner in which the case

has been presented, to ascertain the facts. We have not only examined the briefs, arguments and abstract, but we have attempted to go into the record, to find the evidence concerning these items. We find there are various pages of the record concerning many of these items which have not been called to our attention in the abstract. In order to ascertain the correctness of the ruling of the chancellor, it would be necessary for this court to read the entire record of 1000 pages, to abstract the same and note the various pages upon which the testimony was found concerning each specific item. Upon appeal the reviewing court is not called upon to search the record as it would be necessary for us to do in this case in order to ascertain the correctnes of the ruling of the chancellor.

Notwithstanding themanner in which this case has been presented, from the examination which we have made of the briefs, arguments and abstract and that part of the record which we have read, we are of the opinion that it was given careful consideration by the master and also by the chancellor. The evidence presented is, on many of the items so uncertain and so unsatisfactory that opinions might differ as to whether an item should be allowed or not. In many instances, in reference to the items complained of, the evidence simply shows that one of the parties testified that he thought it was a proper charge, while the other party testified that he did not remember about it at all. The complaint of the action of the chancellor is based largely upon the fact that the chancellor refused to allow credit to the appellant for these seventeen items because the evidence concerning them was uncertain and also because the chancellor held

them was uncertain and also because the counsel for these seventeen items because the evidence during the counsellor refused to allow counsel to [illegible] for the counsellor is based largely upon the fact that the [illegible] about it at all. The complaint of the solicitor [illegible] while the other party testified that he did remember parties testified that he thought it was a proper charge, plained of, the evidence simply shows that one of the not. In many instances, in reference to the items complained might differ as to whether an item should be allowed or the items so uncertain and so unsatisfactory that opinions the counsellor. The evidence presented is, on many of given careful consideration by the master and also by which we have read, we are of the opinion that it was briefs, arguments and abstract and that part of the record presented, from the examination which we have made of the Upon appeal the reviewing court is not called upon to the testimony was found concerning each specific item. abstract the same and note the various pages upon which this court to read the entire record of 1000 pages, to the ruling of the counsellor, it would be necessary for the abstract. In order to ascertain the correctness of items which have not been called to our attention in various pages of the record concerning many of these evidence concerning these items. We find there are we have attempted to go into the record, to find the only examined the briefs, arguments and abstract, but has been presented, to ascertain the facts. We have not

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that the burden was upon the appellant to establish his case, and that he had failed to do so by the preponderance of the evidence, therefore, the items should not be allowed. From our examination of the record we think the chancellor was fully justified in his rulings. The presumption is that the decree is correct and unless we can clearly see that it is not correct it is our duty to affirm it.

Complaint is made by appellant of that part of the decree which provides that each party shall pay one half of the cost. It is urged that the appellant was compelled to file this bill for the purpose of establishing his rights and he should not be punished by having to pay one half of the costs. The appellant alleged that there was due from the appellee about $10,000 and only about one-tenth of that amount was found due by the master and a much smaller amount was finally decreed by the chancellor. Whileit is true that the appellee kept the books of account, yet it was as much the duty of appellant to keep these books and to see that a proper record was made of the various transactions as it was the duty of the appellee to keep them. Both parties were responsible for the condition of their affairs and for the large record in the case. In chancery cases the question of cost is largely a matter of discretion of the trial court, and while it is a judicial discretion reviewable upon appeal, ordinarily the decision of the trial court will be accepted as final unless the discretion has been abused which has not been done in this case. Merle vs. Beifeld, 275 Ill.594.

We find no reversible error and the decree of the circuit court will be affirmed.

Decree affirmed.

that the burden was upon the appellant to establish his case, and that he had failed to do so by the preponderance of the evidence, therefore, the items should not be allowed. From our examination of the record we think the chancellor was fully justified in his rulings. The presumption is that the decree is correct and unless we can clearly see that it is not correct it is our duty to affirm it.

Complaint is made by appellant of that part of the decree which provides that each party shall pay one half of the cost. It is urged that the appellant was compelled to file this bill for the purpose of establishing his rights and he should not be punished by having to pay one half of the costs. The appellant alleged that there was due from the appellee about $10,000 and only about one-tenth of that amount was found due by the master and a much smaller amount was finally decreed by the chancellor. Whilst it is true that the appellee kept the books of account, yet it was as much the duty of appellant to keep these books and to see that a proper record was made of the various transactions as it was the duty of the appellee to keep them. Both parties were responsible for the condition of their affairs and for the large record in the case. In chancery cases the question of cost is largely a matter of discretion of the trial court, and while it is a judicial discretion reviewable upon appeal, ordinarily the decision of the trial court will be accepted as final unless the discretion has been abused which has not been done in this case. Morris vs. Bailey, 47 Ill.334

We find no reversible error and the decree of the circuit court will be affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

_____

Clerk of the Appellate Court.